GUIDANCE ON CASES INVOLVING THE EMPLOYEE ASSISTANCE PROGRAM, EMPLOYEE AND LABOR RELATIONS, AND EEO

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

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PREFACE

Over the last few years, dealing with employees who have performance or conduct deterioration complicated by an alcohol, drug or emotional problem has become increasingly confusing and complicated. Case law has been changing dramatically. New laws, such as the Drug-Free Workplace Act and the Americans with Disabilities Act, have also changed the way these cases are handled.

The Office of Personnel Management (OPM) responded by creating draft guidance on handling these types of cases as well as a document to help make sense of the case law. They next began a dialogue with a number of Federal agencies to present their products. In HHS, the Employee Relations (ER) staff and the Employee Assistance Program (EAP) Director's office first became involved in these discussions. There was so much interest and concern about the subject that a meeting of just HHS ER and EAP personnel in Washington was held in 1992.

The meeting was a success. There is a great deal of interest in handling these types of cases correctly and consistently. There was also a lot of compassion for helping valuable employees return to full productivity. Most important, there was a sincere desire to work cooperatively on these matters. But the meeting also pointed out very clearly the lack of understanding about what each office does and about the best ways of dealing with these types of situations.

One of the suggestions from the meeting was that HHS develop a manual on this issue. The EAP took responsibility for organizing the product, which is found on the following pages. This manual incorporates not only the draft guidance created by OPM staff, but provides more information on the laws and regulations affecting the EAP and other personnel offices, on mental health issues not related to substance abuse, and on resources available to assist with these topics.

This document will be updated as necessary, to reflect current case law and legislation. It is hoped that this will be a useful tool for assisting the EAP, LR, EEO and ER communities in working as partners with employees experiencing work and personal problems.

EAP AND PERSONNEL GUIDANCE
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INTRODUCTION

A number of laws and regulations influence the way in which employees having personal problems such as substance abuse, stress, and family concerns are handled by supervisors, the Employee Assistance Program (EAP), Employee Relations (ER) and other personnel (such as EEO) and union specialists. They are briefly described in this section. How these laws and regulations affect the EAP and the program's relationship to other offices will be discussed in later chapters.

CHAPTER 1: RELEVANT LAWS AND REGULATIONS

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UNIT 1: AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973

A: CONTENT AND RELATIONSHIP OF ACTS TO FEDERAL GOVERNMENT

On July 26, 1990, Congress passed Public Law 101-336, "The Americans with Disabilities Act" (ADA). The ADA is a comprehensive anti-discrimination statute that prohibits discrimination against individuals with disabilities in private and state and local government employment, and in the provision of public accommodations, public transportation, state and local government services, and telecommunications. The purposes of the ADA are to provide a clear national mandate to end discrimination against individuals with disabilities (physical and mental) and to provide strong, consistent, enforceable standards prohibiting discrimination against such individuals. (Sec. 2(b) (1)(2)).

The ADA consists of five titles. Title I prohibits employment discrimination. Title II applies to public services provided by state and local government, and in particular to transportation provided by public agencies. Title III applies to public accommodations. The fourth title requires telephone companies to provide services that will enable persons with hearing impairments to communicate freely. Title V contains miscellaneous provisions, including amendments to the Rehabilitation Act of 1973.

For the most part, the Federal Government is exempt from the ADA. It is already covered by similar nondiscrimination requirements and additional affirmative employment requirements under Section 501 of the Rehabilitation Act of 1973. However, the ADA, in Title V, does make one change to the Rehabilitation Act. Below is a description of the amendment.

B: EMPLOYEES WHO USE DRUGS ILLEGALLY

Current illegal use of drugs is not a protected disability under the Rehabilitation Act. This includes people who use prescription drugs illegally as well as those who use illegal drugs. However, people who have been rehabilitated and do not currently use drugs illegally, or who are in the process of completing a rehabilitation program may be protected. Employees may also be protected because of other disabilities (other than drug use). The new language also allows for employers to test for drug use or implement other procedures and policies to ensure that individuals are no longer engaging in drug use. Chapter 2

discusses these issues (including the issue of disciplining employees solely for their drug use) in more detail.

C: EMPLOYEES WHO USE DRUGS ILLEGALLY AND ALSO HAVE ANOTHER HANDICAP

Neither the law nor EEOC's 29 CFR 1614 are clear on the status of an individual who is handicapped and is also an illegal user of drugs. These employees may continue to be considered handicapped under the Rehabilitation Act.

While current drug users are not protected by the new language, a person who is handicapped by alcoholism continues to be covered by the Rehabilitation Act if he or she is a qualified handicapped person.

D: MENTAL IMPAIRMENT

Persons with mental impairments continue to be covered under the Rehabilitation Act. The impairment must, as any other disability, substantially limit one or more major life activities. There must also be a record of the disability and the employee must be regarded as having such an impairment.

CHAPTER 1: RELEVANT LAWS AND REGULATIONS
UNIT 2: DRUG-FREE WORKPLACE

A: EXECUTIVE ORDER ESTABLISHING THE DRUG-FREE WORKPLACE

On September 15, 1986, President Reagan signed Executive Order 12546, establishing the goal of a drug free federal workplace. The order made it a condition of employment for all federal employees to refrain from using drugs illegally on or off-duty.

The Executive Order recognized that illegal drug use is seriously impairing a portion of the national workforce, resulting in the loss of billions of dollars each year. It also states that as the largest employer in the country, the federal government has a compelling interest in establishing reasonable conditions of employment, including the prohibition of illegal drug use.

B: IMPLEMENTATION OF THE EXECUTIVE ORDER

On July 11, 1987, Congress passed P.L. 100-71, the Supplemental Appropriations Act of 1987, Section 503, of which concerned the implementation of Executive Order 12546. This legislation established requirements for uniformity among federal agency drug-free workplace plans, reliable and accurate drug testing, confidentiality of drug test results, and centralized oversight of the federal government's drug testing program. In keeping with these mandates, HHS published a plan for a drug free workplace among its employees.

The Employee Assistance Program was given an important role in the functions listed above. The Executive Order required that each agency have an EAP to provide education, counseling and referral to rehabilitation.

CHAPTER 1: RELEVANT LAWS AND REGULATIONS
UNIT 3: CONFIDENTIALITY

A: LAWS AND REGULATIONS COVERING EAP RECORDS

The confidentiality of EAP records and information about employees who use the program is protected by Federal law and regulation. The Privacy Act of 1974 covers all records maintained by the EAP. EAP records of clients with alcohol and substance abuse problems are subject to extra restrictions, the "Confidentiality of Alcohol and Drug Abuse Patient Records" regulations (42 CFR Part 2), as amended in 1987.

Basically, these laws and regulations prohibit the unauthorized disclosure of any information about employees who use the EAP. Except where disclosure without consent is allowed (see below), the employee's written consent must be obtained before any release of information can be made. This includes all releases, including those to supervisors, employee relations staff, treatment facilities, and family members, without regard to the type of problem the individual is experiencing. Written consent must always be voluntarily given.

B: DISCLOSURES PERMITTED WITHOUT EMPLOYEE CONSENT

Certain disclosures of information may be made without the employee's consent. They are:

- o when the disclosure is allowed by a court order or the Department of Justice in certain litigation situations
- o when the disclosure is made to medical personnel in a medical emergency
- o when the disclosure is made in a non-identifiable form to qualified personnel for research, audit or program evaluation
- o to a private firm, individual or group providing EAP services contractually.

C: INFORMATION NOT PROTECTED BY THE LAWS AND REGULATIONS

There are also certain kinds of information that are not protected by the laws and regulations discussed above. They are:

- o information about a crime committed by a client at the EAP or against any person who works for the EAP or about any threat to commit such a crime

- o information on crimes that may harm other people or cause substantial property damage, as long as the EAP does not identify the client as an alcohol or drug user

- o information about suspected child abuse or neglect which must be reported under State law to appropriate State or local authorities

- o confirmation about whether or not a client made or kept EAP appointments during duty hours or on sick leave may be given to the client's direct supervisor

- o confirmation of a verified positive drug test result (under the Drug-Free Workplace Program).

D. SECONDARY DISCLOSURE PROHIBITION

Federal confidentiality rules prohibit the person receiving confidential information from making any further disclosure of the information. A secondary disclosure of the information may be made, however, if it is expressly permitted by the written consent of the person to whom it pertains.

Consent for secondary disclosure must be obtained on a correctly formatted form. An officially approved sample can be obtained from the EAP. In addition, persons who receive confidential information must be informed in writing about the prohibition on secondary disclosure.

CHAPTER 1: RELEVANT LAWS AND REGULATIONS
UNIT 4: STANDARDS OF ETHICAL CONDUCT

A: GENERAL DESCRIPTION OF THE STANDARDS OF ETHICAL CONDUCT

Job conduct problems sometimes occur as a result of an employee's personal problem. In these instances, the Standards of Ethical Conduct may influence decisions made about the conduct.

The Standards of Ethical Conduct were promulgated by the Office of Government Ethics (most recently in February 1993) to ensure that the business of Federal agencies is conducted effectively, objectively, and without improper influence or the appearance of improper influence. The standards also attempt to ensure that Government employees are persons of integrity and observe high standards of honesty, impartiality, and behavior.

B: RELATIONSHIP OF STANDARDS OF ETHICAL CONDUCT TO ALCOHOL AND DRUG USE

The standards are particularly relevant to the EAP for issues related to alcohol and drug use. Being intoxicated or possessing, distributing, or using narcotics or dangerous drugs is prohibited at the workplace. Violations of these regulations may be the cause for disciplinary action which could be in addition to other penalties prescribed by the law. The type of disciplinary action to be taken is determined in relation to the violation and may go as far as removal.

CHAPTER 1: RELEVANT LAWS AND REGULATIONS
UNIT 5: HHS PERSONNEL INSTRUCTION 792-2

A: GENERAL DESCRIPTION OF THE EAP POLICY

HHS policy related to the EAP is found in Personnel Instruction 792-2. The most current version was signed by the Assistant Secretary for Personnel Administration on April 23, 1990.

This policy is important for a number of reasons. It outlines the scope of the program and the various services provided. It fully describes leave usage and job security in relation to an employee's use of the EAP. The policy strongly supports confidentiality and details the laws and regulations which apply to this issue.

The policy also outlines the procedures to follow for making formal and informal supervisor referrals to the EAP, including the role of Employee Relations. Staff qualifications and other staffing issues are described. Finally, the EAP's integration with the Department's Drug-Free Workplace is outlined.

B: PURPOSE AND AUTHORITY OF THE EAP

The EAP in HHS was developed a number of years ago to address deficient employee work performance, conduct, attendance, reliability, or safety resulting from personal problems. Personnel Instruction 792-2 acknowledges that when personal problems are effectively dealt with and treated, affected employees are expected to become healthier, better adjusted individuals, who are likely to perform more productively in their jobs.

The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616) and the Drug Abuse Treatment Act of 1972 (P.L. 92-255) authorized Federal agencies to provide appropriate alcohol and drug abuse services for civilian employees. P.L. 79-658, 5 U.S.C., Section 7901, also authorized heads of Departments to establish health service programs to promote and maintain the physical and mental fitness of employees.

In 1986, the Omnibus Drug Enforcement, Education, and Control Act (P.L. 99-570) was enacted. That law reiterated Congressional concern about the prevention of illegal drug use and the referral for treatment of Federal employees who use drugs. (5 U.S.C., Section 7361, et seq.) Also in 1986, Executive Order 12564 established further requirements for agencies and employees in order to obtain a drug-free Federal workplace. Section 503 of

P.L. 100-71 (1987) was enacted to establish requirements for implementation of the Executive Order. The EAP was given a major role in each of these.

C: ROLES AND RESPONSIBILITIES

Personnel Instruction 792-2 outlines the roles and responsibilities of HHS staff in relation to the EAP. The Assistant Secretary for Personnel Administration (ASPER) is responsible for oversight and implementation of the Department's EAP, for the development of the program's policy and guidelines, and for the evaluation of the program. The Director, EAP, assists the ASPER in accomplishing these objectives.

EAP Administrators have responsibility for the day-to-day EAP operations within their assigned organizational or regional jurisdictions. They usually manage the EAP in one of three ways: 1) with an in-house staff of professional EAP counselors; 2) as part of a Federal EAP consortium (usually sponsored by PHS); and 3) by monitoring their own contractual EAP providers.

Personnel Instruction 792-2 also outlines the responsibilities of the Operating Divisions, Regional Directors, Servicing Personnel Offices, supervisors, personnel staff, unions, health unit staff, and physical security personnel.

CHAPTER 2: DISCUSSION OF DEFINITIONS AND GUIDELINES

INTRODUCTION

In the previous chapter, a number of laws, regulations and policies which influence the handling of employees with personal problems were described. In this chapter, the reasons why they are important will be discussed. This will include their relationship to case law, how they impact the EAP, and guiding definitions which have arisen from the laws and regulations.

NOTE: READERS SHOULD BE CAUTIONED THAT ANY NEGOTIATED AGREEMENTS AND AGENCY POLICIES/PRACTICES MUST BE TAKEN INTO CONSIDERATION WHEN APPLYING THE GUIDANCE IN THIS CHAPTER.

CHAPTER 2: DEFINITIONS AND GUIDELINES

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UNIT 1: DEFINITION OF "INDIVIDUAL WITH A DISABILITY" IN THE REHABILITATION ACT

A: GENERAL DESCRIPTION OF THE DEFINITION'S THREE PARTS

When making a determination about whether an employee is protected by the Rehabilitation Act, it may be helpful to know who is considered a "qualified individual with a disability." The definition has 3 parts, which reflect the specific types of discrimination usually experienced by people with disabilities.

Under the Rehabilitation Act (and the Americans with Disabilities Act) an individual with a disability is one who has:

- o a physical or mental impairment that substantially limits one or more major life activity;
- o a record of such an impairment; or
- o is regarded as having such an impairment.

B: PART 1 OF THE DEFINITION

Definition of a Mental Impairment Under Part 1

A mental impairment (which is what the EAP is typically concerned with) is defined as "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." The law does not attempt to list all possible impairments. A person's impairment is determined without regard to any medication that s/he may use. For example:

> A person who has a major depressive disorder and uses a drug to control its effects would be considered to have an impairment, even if the medication reduces the impact of that impairment.

The EEOC, in its technical assistance manual for implementing the Americans with Disabilities Act (ADA) further clarifies the above definition. "A physical condition that is not the result of a physiological disorder, such as pregnancy, or a predisposition to a certain disease, would not be an impairment. Similarly,

personality traits such as poor judgement, quick temper or irresponsible behavior, are not themselves impairments. Environmental, cultural, or economic disadvantages, such as lack of education or a prison record also are not impairments." They give the following example:

> "A person who can not read due to dyslexia is an individual with a disability because dyslexia, which is learning disability, is an impairment. But a person who cannot read because she dropped out of school is not an individual with a disability because lack of education is not an impairment."

The EEOC manual also says, "stress and depression are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder." The example they provide is:

> "A person suffering from general "stress" because of job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability."

Other Comments about Impairments

Since the EAP often assists persons with AIDS, it is important to note that the Rehabilitation Act <u>does</u> cover persons with contagious diseases. The Supreme Court ruled that an individual with tuberculosis which affected her respiratory system had an impairment under the Rehabilitation Act.

"However, although a person who has a contagious disease may be covered by the [Rehabilitation Act], an employer would not have to hire or retain a person whose contagious disease posed a direct threat to health or safety, if no reasonable accommodation could reduce or eliminate this threat."

Persons who currently use drugs illegally are not protected by the Rehabilitation Act. This area will be discussed in more detail in a later section.

C: PARTS 2 AND 3 OF THE DEFINITION (COVERS THOSE WHO MAY OR MAY NOT HAVE A DISABILITY BUT WHO MAY BE SUBJECT TO DISCRIMINATION)

Thus far, the discussion has focused on the first part of the definition of an "individual with a disability", which protects people who currently have an impairment that substantially limits

a major life activity. This section focuses on the second and third parts of the definition which protect people who may or may not actually have such an impairment, but who may be subject to discrimination because they have a record of or are regarded as having such an impairment.

Record of an Impairment

The second part protects people who have a history of a disability, whether or not they are currently limited by the disability. "This part of the definition also protects people who may have been misclassified or misdiagnosed as having a disability." The EEOC gives the following example:

> "A job applicant formerly was a patient at a state institution. When very young, she was misdiagnosed as being psychopathic and this misdiagnosis was never removed from her record. If this person is otherwise qualified for a job, and an employer does not hire her based on this record, the employer has violated the [Rehabilitation Act]."

Regarded as Substantially Limited

The third part of the definition describing who is disabled protects people who are not substantially limited in a major life activity but who have discriminatory actions taken because they are perceived to have such a limitation. This part protects people from discrimination based on myths, fears and stereotypes about disability, which occur even when a person does not have a substantially limiting impairment.

This type of discrimination would occur in three circumstances:

> 1. The individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment.
>
> 2. The individual has an impairment that is substantially limiting because of attitudes of others towards the condition.
>
> 3. The individual may have no impairment at all, but is regarded by an employer as having a substantially limiting impairment.

The EEOC manual provides this example:

> "An employer discharged an employee based on a rumor that the individual had HIV disease. This person did not have

any impairment, but was treated as though she had [one]."

CHAPTER 2: DEFINITIONS AND GUIDELINES
UNIT 2: DEFINITIONS AND GUIDELINES ON ALCOHOL AND DRUG USE FOUND IN ALL LAWS AND REGULATIONS

INTRODUCTION

An employee's use of alcohol and/or drugs is a concern in all of the laws and regulations described in Chapter 1. In this section, the ways in which each deal with alcohol and drug use are discussed as well as any relationships between the laws and regulations on this topic.

A: REHABILITATION ACT

Definition of a "Drug"

The recent amendments to the Rehabilitation Act specifically exclude individuals who currently use drugs illegally when an employer takes action because of their continued use of drugs. This includes people who use prescription drugs illegally as well as those who use illegal drugs. (29 U.S.C., Section 706 (8)(F)(iii))

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. The term does not include the use of a drug taken in accordance with the directions and under the supervision of a licensed health care professional.

Definition of "Current Drug Use"

EEOC guidance does not provide a strict definition of "current" drug use. Their manual states, "current drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days, in terms of employment action." It is determined on a case-by-case basis. Therefore:

> "An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he is in rehabilitation and is therefore not a current illegal drug user."

Which Drug Users are Protected by the Rehabilitation Act

Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or have been rehabilitated successfully, are protected from discrimination on the basis of past drug addiction. The following is an example provided by EEOC:

> An addict who is currently in (or has successfully completed) a drug rehabilitation program and has not used drugs illegally for some time may be protected against discrimination by the Rehabilitation Act. This person will be protected because s/he has a history of addiction.

"A rehabilitation program" may include in-patient, out-patient, or employee assistance programs, or recognized self-help programs such as Narcotics Anonymous."

"Individuals who are not illegally using drugs, but who are erroneously perceived as being addicts and as currently using drugs illegally, are protected..." The following is an example of how this type of discrimination may occur:

> "If an employer perceived someone to be addicted to illegal drugs based upon rumor and the groggy appearance of the individual, but the rumor was false and the appearance was a side-effect of a lawfully prescribed medication, this individual would be "regarded as" an individual with a disability (a drug addict) and would be protected from discrimination based upon that false assumption..."

In the above example, the employer perceived the person to be a drug addict and thus may have discriminated against the person. However, if the same employee behavior occurred and the supervisor simply perceived it as social drug use, the person would not be regarded as an individual with a handicap and would not be protected by the Rehabilitation Act.

Protection for Alcoholics

The ADA (and therefore the Rehabilitation Act) did not change the definition of "individual with a disability" with respect to employees handicapped by alcoholism. As in the past, these employees may still be offered protection.

However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not able to perform essential job functions. Note that case law on penalty determination holds that an agency's choice of penalties should consider factors such as the prospect for rehabilitation, the

nature of the offense, and the agency's assistance or failure to assist the individual.

B: DRUG-FREE WORKPLACE (DFW)

Introduction

The Drug-Free Workplace (DFW) movement, and its subsequent laws and guidelines, have had a major impact on the HHS EAP. It also has had an influence on many of the other laws and regulations mentioned in Chapter 1. The DFW's relationship to these will be discussed in this section, as well as some other important points about the DFW itself.

Relationship Between the DFW and the Rehabilitation Act Including Drug Testing

The recent amendments to the Rehabilitation Act make it clear that employers may adopt or administer reasonable policies and procedures, <u>including but not limited to drug testing,</u> to ensure that an individual is no longer engaging in the illegal use of drugs. The ADA goes further than the Rehabilitation Act in explaining the issue of drug and alcohol use in the workplace. The ADA states that an employer may prohibit the illegal use of drugs and the use of alcohol at the workplace; may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; and may require that all employees behave in conformance with the requirements established under the DFW Act of 1988.

The ADA also takes a neutral stand on drug testing. Such tests are neither encouraged, authorized nor prohibited. The results of drug tests may be used as a basis for disciplinary actions. Drug tests are not considered medical examinations by the ADA.

Relationship Between DFW and EAP (Including EAP Responsibilities)

The DFW's relationship to the EAP is described in the HHS DFW plan as well as Personnel Instruction 792-2. The HHS DFW Plan (which is based on the legislation outlined in Chapter 1) gives a great deal of responsibility to the Department's EAP. Briefly, the EAP's basic DFW responsibilities are:

1. Provide counseling and assistance to employees in their efforts to overcome current drug use and refrain from future

use as well as to supervisors and managers in dealing with their employees' illegal drug use. This shall include:

- o completing a Job Rehabilitation Contract for every employee referred to the EAP through the Medical Review Officer (MRO)(because of a positive drug test) or who self-refers under the provisions of Safe Harbor (see discussion below). These will be developed with input from management, employee relations, or other appropriate persons.

- o monitoring employee progress in treatment.

- o maintaining confidentiality (discussed in more detail below).

2. Provide, to all employees, education on drugs and their use/abuse.

3. Assist HHS personnel staff with orienting employees on the DFW Plan and with training supervisors on their roles with the Plan.

The EAP is also involved with some procedures related to the drug testing aspect of the DFW Plan. While the EAP is not involved with the actual drug testing program, it does:

1. Receive notice of a positive drug test from the MRO.

2. Coordinate with the MRO to inform the employee's immediate supervisor of the result.

3. Provide information on availability of treatment resources for job applicants who test positive.

Safe Harbor Provisions

Two other aspects of the DFW Plan are important for this discussion. One is the Safe Harbor provision. This protects an employee from disciplinary actions that may be taken against an employee found to be using drugs illegally. These employees must voluntarily admit the drug use before being identified through other means, must complete counseling/rehabilitation as determined and monitored by the EAP, and must not use drugs again. A Job Rehabilitation Contract must be completed. The Safe Harbor provision cannot protect employees from disciplinary actions or random testing if they refuse to notify their supervisors that they are seeking help for their drug problems. It also cannot protect employees who have been found to use drugs

illegally a second time.

Relationship Between DFW and Confidentiality

Although the same laws and regulations apply to the records of the DFW program as the EAP, there has been one exception made to accommodate the drug testing part of the Plan. This exception is that once the MRO notifies the EAP of a verified positive test result, the employee's immediate supervisor shall be contacted by the EAP to discuss the result in order to make further intervention plans. This may be done without the employee's written consent, except when the employee is already seeking assistance for a substance abuse problem through the EAP. In this event, the EAP shall attempt to obtain the employee's consent to discuss that fact before contacting the supervisor. If the employee's consent cannot be readily obtained, the EAP should contact either the EAP Director or the Department's DrUg Program Coordinator before informing the supervisor.

C: STANDARDS OF ETHICAL CONDUCT: ITS VIEW ON ALCOHOL AND DRUG USE

As discussed in Chapter 1, the Standards of Ethical Conduct prohibit the use, possession, and distribution of drugs on the premises. They also prohibit being intoxicated at work. The Standards view these concerns as behavioral and conduct issues, rather than mental health problems. As seen in the following chapter, court determinations and other administrative rulings often differentiate between the conduct related to alcohol and drug use and the diseases of alcohol and drug addiction.

CHAPTER 2: DEFINITIONS AND GUIDELINES
UNIT 3: MENTAL HEALTH

A: RELATIONSHIP TO REHABILITATION ACT AND PRIVACY ACT

The guidance on matters concerning the mental health problems (other than alcohol and drug addiction) of employees is a little more sketchy. As mentioned above, the Rehabilitation Act does prohibit discrimination against persons with mental impairments. Also, the Privacy Act does mandate the confidentiality of information regarding the mental health problems of employees, although it is not as strict as the regulations covering the records of employees with alcohol and drug problems.

[In an attempt to bring these discrepancies into conformity with each other and on the advice of OGC, Personnel Instruction 792-2 does indicate that all records of the EAP will be treated the same. This is because if the EAP maintains separate alcohol/drug records, those employees having alcohol or drug problems would be identified as having such problems by their file locations, which is prohibited by 42 CFR Part 2.]

B: OTHER MENTAL HEALTH CONCERNS

Although certain mental health problems (such as compulsive gambling) were excluded by the ADA, the amendments to the Rehabilitation Act did not include such language. In HHS, these mental health concerns, while excluded by the ADA, are still a primary focus of the EAP and its policy, Personnel Instruction 792-2. All of the EAP services provided to employees with alcohol and drug problems have been expanded over time to include all emotional problems.

Although legislative guidance on mental health problems has been limited, case history and experts on the ADA and the Rehabilitation Act have provided the field with some help in handling employees with these types of problems.

CHAPTER 3: DISCUSSION OF CASE LAW ON ALCOHOL AND DRUG ABUSE AS HANDICAPPING CONDITIONS

INTRODUCTION

As seen in the previous discussion, there is a great deal to know about handling employees with all kinds of emotional problems, but particularly those with alcohol and drug abuse. Because of the nature of the disciplinary review process in the Federal Government, agencies have not been able to count on consistency, even when the facts of the cases seem similar. Understandably, everyone has some hesitancy dealing with these issues.

Cynthia Field, of the Office of Personnel Management (OPM), has prepared a staff paper on the issue of substance abuse (the vast majority of cases are in this area) as it relates to case law. This paper follows. It sets out the case law on substance abuse as a handicapping condition as it has evolved in the last few years before MSPB, EEOC and the courts, and provides an analytical framework for agencies when they are considering courses of action. The framework reflects first the employee's burdens, with illustrative cases, and then outlines the burdens the agency must carry, again with illustrative cases.

CHAPTER 3: DISCUSSION OF CASE LAW ON ALCOHOL AND DRUG ABUSE AS HANDICAPPING CONDITIONS

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UNIT 1: EMPLOYEE'S BURDENS

A: ESTABLISHING THAT ALCOHOL OR DRUG ABUSE IS A HANDICAPPING CONDITION

Prior to the Board's decision in *McCaffrey v. U.S. Postal Service*, MSPB Dkt. No. PH07528610112, 36 M.S.P.R. 234 (1988), employees had only to make a general showing of a problem with alcohol or drug use to establish that they were covered under 29 U.S.C. § 501 and thus entitled to reasonable accommodation of their handicap. *Downing v. Department of the Navy*, MSPB Dkt. No. AT07528110777, 16 M.S.P.R. 388 (1983) held that employees did not need to show more than the existence of drinking problems in order to establish that their alcohol conditions were within the meaning of the Rehabilitation Act. *Avritch v. Department of the Navy*, MSPB Dkt. No. DC04328210548, 27 M.S.P.R. 542 (1985) held that there was no basis for requiring a medical diagnosis to establish alcoholism. In *Avritch*, information such as drinking during work hours, stumbling gait, slurred speech, sleeping at the desk, shaky hands, and odor of alcohol on the breath was sufficient for the Board. *Avritch* is still useful to determine when an employee is "under the influence."

McCaffrey changed the rules, **insofar as the Board's consideration of an employee's claim of alcoholism or drug addiction as a handicapping condition**. In that case, the Board found that previous cases did not put appellants on notice of what is necessary to establish a handicap of drug or alcohol abuse before the Board, and stated that it was offering "the following specific guidance to the administrative judge and the parties concerning this issue." The Board stated that there must be a careful consideration of whether employees are simply drug or alcohol users, who are not handicapped even though they may be intoxicated at the time of the misconduct or performance problem, or whether they are alcohol or drug abusers who are addicted to a substance and therefore suffer from a handicapping condition. It pointed out that the intent of both the Rehabilitation and Alcohol and Drug Abuse Acts was to provide assistance to employees who have lost the ability to control their behavior because of the long-term effects of alcohol or drug use. It was not to "protect those who misuse alcohol and drugs occasionally, but who retain control of their actions and must be held accountable." Congress recognized this distinction between

occasional use and addiction when it defined *addict* in several provisions of law.

The Board held that in order to establish that the use of alcohol or drugs constituted a handicapping condition of substance abuse or addiction covered by the Rehabilitation Act of 1973, employees must show more than the mere misuse of alcohol or drugs occasionally. They must provide their own evidence on their patterns of substance use and the effect on themselves; evidence from experts in the field as to whether their patterns of substance use along with other symptoms demonstrated by the employees constitute the handicap of substance abuse. Testimony by the appellants and their families, friends, and coworkers can be helpful but not usually sufficient in itself to prove substance dependence. Appellants must present expert evidence of drug or alcohol dependence at the time of the misconduct leading to the agency action. This expert evidence can include objective clinical findings (test results, observation of physical signs; medical diagnoses based on evaluation; and evaluation and assessment by nonmedical experts in the field of drug rehabilitation). However, these expert opinions must be more than conclusory statements and indicate the factors on which they are based. A recent decision by EEOC reinforces these holdings, since it held that an employee who formerly **used** drugs was not a handicapped person covered by the Rehabilitation Act:

> "The evidence in the record is limited to appellant's assertion that he formerly used or abused drugs. At the time the events at issue arose, current drug abusers were within the protection of the Rehabilitation Act. [See below for a discussion of ADA changes to the Rehabilitation Act.] The Act was not intended to protect those who misused drugs on an occasional basis. The record contains no evidence that appellant ever displayed signs of dependency or addiction, or that he was unable to control his actions by virtue of his drug use. Further, appellant did not submit any evidence documenting a drug addiction." *Branch v. Coughlin (U.S. Postal Service)*, EEOC Dkt. No. 01920807, June 12, 1992.

Note, however, the holding in *Terry v. Department of the Navy*, MSPB Dkt. No. SF07528710394, 39 M.S.P.R. 565 (1989), a case that concerned an agency's obligations to consider reasonable accommodation **before** removing an employee, not the employee's burden of proof of an alleged handicapping condition before the Board. (The Board noted that the report of treatment in an alcohol and drug dependency program the employee gave the agency at the time of her oral reply would have been sufficient to establish a claim of drug dependence had she made that claim.)

See section below concerning the agency's **knowledge** of a handicap.

A new factor has been introduced into the consideration of alcohol or drug abuse as a handicapping condition, that is, the Americans with Disabilities Act (ADA), which was enacted on July 26, 1990. The Act amended 29 U.S.C. § 706(8) of the Rehabilitation Act of 1973 to provide that the term "individual with handicaps" no longer includes "an individual who is currently engaging in the illegal use of drugs." The interpretation of "currently engaging" in illegal drug use in the Conference Report on the Act, and cited in EEOC's proposed regulations for the private sector (F.R. Volume 156, No. 40, February 28, 1991), is that the term is not intended to be limited to the use of drugs on the day of an incident for which the agency takes action. An employee who has used illegal substances within a few weeks, perhaps a month, may be considered to be actively engaging in this use. An interpretation of "current" will be determined on a case by case basis. Only employees who have successfully rehabilitated and are no longer using illegal drugs, are currently in a rehabilitation program without further use, or have been erroneously regarded as engaging in illegal drug use are now covered under the Rehabilitation Act. The Federal Labor Relations Authority (FLRA) also issued a decision (*AFGE v. Department of Health and Human Services*, 43 FLRA No. 114, February 6, 1992) pointing out that one proposal by the union was nonnegotiable because it would bar the agency from removing illegal drug users who have entered rehabilitation programs, although the ADA excludes current illegal users of drugs from coverage as handicapped persons. With its April 10, 1992 publication of final regulations on EEOC procedures (Part 1614, effective October 1,1992), the Commission has specifically cited the ADA in redefining "individual with handicaps" so it no longer includes current users of drugs, as defined in the ADA. (29 CFR 1614.203(h))

Apparently, however, no change has been made in the Federal sector on current use of alcohol as a handicapping condition. (See footnote 4 in *Fuller v. Frank*, 916 F.2d 558, 9th Cir. 1990, which pointed out that the amendment to the Rehabilitation Act concerning current use of alcohol did not apply to the section pertaining to Federal employment.)

B: ESTABLISHING THAT THERE IS A CAUSAL CONNECTION BETWEEN THE HANDICAPPING CONDITION AND THE MISCONDUCT OR POOR PERFORMANCE AT ISSUE

Appellate decisions on the **causal connection** (relationship or nexus) between an employee's handicapping condition of substance

dependence or addiction and the misconduct or performance on which an agency's adverse or performance action is based have gradually but steadily imposed more stringent tests on the employee to show the connection. An example of MSPB's earlier and easier test for the proof of causality is *Mayers v. Government of the District of Columbia*, MSPB Dkt. No. DC07528110403, 21 M.S.P.R. 144 (1985) in which the findings suggested that where the employee made a showing of a likely connection and the agency did not deny the connection, the Board would accept the relationship as proven. Similarly, in *Corral v. Department of the Navy*, MSPB Dkt. No. SF07528610409, 33 M.S.P.R. 209 (1987), the employee testified that the weekend before the day he was AWOL, he was on an alcoholic drinking binge which directly contributed to the AWOL, and the agency did not controvert this testimony. Beginning with *Brinkley v. Veterans Administration*, MSPB Dkt. No. SL07528610181, 37 M.S.P.R. 682 (1988), the Board has established, and EEOC has generally followed, a more critical analysis of the employee's claims of causation. See Unit 2:A for a more detailed discussion of this test. One case where an appellant met the *Brinkley* test is *Holley v. Department of Health and Human Services*, MSPB Dkt. No. DC04328910338, 46 M.S.P.R. 80 (1990). Despite the agency's arguments that the appellant's performance was consistently unsatisfactory, while the supervisor only occasionally smelled alcohol on his breath, the Board noted that the employee had been drinking before and during work hours, was in a job requiring analytic ability and the ability to concentrate, both of which his drinking affected. In addition, his deficient work products were incomplete, lacked organization, were poorly written, missed significant issues, and were late, and all these examples "reasonably could have been caused by the effects of alcohol . ."

EEOC decisions have also found a causal connection between an employee's handicapping condition and the agency's leave-related charges. In *Barr v. Marsh (Department of the Army)*, EEOC Petition No. 03890043, November 17, 1989, EEOC found that the employee was handicapped by drug addiction. The Commission then found that her use of drugs caused her to be tardy, and her AWOL resulted from her absence while she was hospitalized for drug addiction. The EAP coordinator testified the employee had a physical addiction to drugs that would lead to withdrawal. Medical evidence diagnosed her as having a multiple dependence on cocaine, heroin, and PCP. The agency was aware of this handicapping condition, and did not dispute that her condition was the cause of her lateness and absences. The EEOC found that the agency had discriminated against the employee by not providing her with a reasonable period of leave for her inpatient treatment. In this case, the Commission recommended a **conditional restoration** pending a determination that Barr had

completed a rehabilitation program and was abstaining from drug use. (See Unit 4 on Conditional Reemployment.)

C: ESTABLISHING THAT THE AGENCY KNEW OF THE EMPLOYEE'S ALCOHOL OR DRUG ABUSE

The employee's burden is next to show that the agency was aware of his or her handicap. Unfortunately, the case law on "reasonable suspicion" is somewhat inconsistent, ranging from getting hints from an employee's behavior to statements by the employee of a problem. To some extent, this question is addressed also in the consideration of **causal connection** (see above).

In *Edwards v. Frank, U.S. Postal Service*, EEOC Dkt. No. 01893412, March 19, 1990, the EEOC dealt with the employee's allegation that, solely because of his alcoholism, the agency denied him reinstatement after he had resigned. The agency denied any knowledge of his alcoholism, but the Commission agreed with the appellant that the agency had known of his handicap and had penalized him for it. Despite agency denials, the employee's periodic unscheduled absences during his three years of employment, his notes from doctors attested to alcoholism, and the discussion of his alcoholism in his grievances challenging suspensions based on his AWOL should have signaled a problem for the agency to investigate further. The remedy ordered was for the agency to offer a comprehensive medical examination to determine whether the appellant was physically capable of meeting the demands of the job he'd applied for. If he was qualified and accepted the agency's offer, he was to be given back pay. If he refused the offer, back pay was to cease on the day of the offer.

Fong v. Department of the Treasury, 705 F. Supp. 41 (D.D.C. 1989), made findings on the same issue. The employee in this case never told the agency of his problem, and the agency did not have enough "signs" to put it on notice of his alcoholism. In this case, a coworker told another supervisor that the employee was having problems which could use professional support, but this discussion was two years before the employee's AWOL became a problem and not with the supervisor who proposed his removal. Furthermore, his supervisors may have raised the possibility of alcohol being a factor in discussing his situation, but did not follow up. He also claimed his supervisors should have smelled alcohol on his breath. The Court, in a detailed discussion of when the agency's obligations to provide accommodation are triggered, first stated that it did not want to extend further protection to those who have hidden their alcoholism from their employers. In this case, the employee missed only a few days of

work because of the alcohol problem; the bulk of his absences were caused by a lower back problem. The Court also stated:

> "[T]he Court believes that there must be limits to the extent to which employers are required to ferret out and investigate possible cases of alcoholism and then confront their employees with their suspicions about alcoholism. Although courts have stated that alcohol is a handicapping condition for which the employee should be aided, it is also clearly *not* like most other handicaps, which are either readily noticeable or which do not trigger denial mechanisms in employees. Although this Court declines to try to set an exact standard for how much knowledge is required to trigger the protection for employees suffering from alcoholism, it does conclude that defendant in the instant case did not have enough "signs" to require that it take steps to try to help Mr. Fong treat his alcoholic condition before discharging him."

The Court also concluded that even though the employee's supervisors may have "raised" the possibility of alcoholism did not mean that the obligation to accommodate was triggered. "The possibility of alcoholism always exists when an employee is often absent; so are the possibilities of drug abuse, gambling, and a host of other things. Without more evidence **at the time** of alcoholism . . . the employer should not be penalized merely for raising the issue and then dropping it for lack of additional evidence."

The MSPB, in *McCaffrey v. U.S. Postal Service*, sets out the amount of proof necessary to demonstrate a handicapping condition. *Terry v. Department of the Navy*, however, changed the standard of proof by requiring agencies to consider a possible handicapping condition with a lesser amount of information:

> "An agency may not simply choose not to believe an employee who has attempted to verify a claim of a handicapping condition based on alcohol or drug dependency. All that an agency needs to have is a <u>reasonable</u> <u>suspicion</u> of alcohol or drug abuse before its duty to accommodate arises." (emphasis in the original)

MSPB has many decisions on what constitutes reasonable suspicion of a possible substance abuse problem. For example, in *Booth v. Department of Health and Human Services*, MSPB Dkt. No. PH07528310437, 23 M.S.P.R. 353 (1984), the supervisor's suspicion of a drinking problem which he discussed with the employee, who then admitted the problem, was enough to put the agency on

notice. The supervisor in *Swafford v. Tennessee Valley Authority*, MSPB Dkt. No. AT07528110740, 18 M.S.P.R. 481 (1983) had heard from the personnel officer that a union official had told **him** the employee had a drinking problem--enough to put the supervisor effectively on notice of the employee's alcoholism. However, in *McGilberry v. Defense Mapping Agency*, MSPB Dkt. No. SL07528110150, 18 M.S.P.R. 560 (1984), the employee had told no one in his chain of command of his problem, only the employee assistance counselor, even after he received his notice of proposed removal.

The Board has held that if an employee raises alcoholism for the first time in the reply to a notice of proposed adverse action, the agency is put on notice of a possible problem, even if the employee's simple assertion of alcoholism does not constitute proof of it; see *Noe v. U.S. Postal Service*, MSPB Dkt. No. SF07528411002, 28 M.S.P.R. 86 (1985). *Deskins v. Department of the Navy*, MSPB Dkt. No. DC04328410014, 29 C.F.R. 276 (1985), reversed the agency because the employee told the oral reply official that he had been arrested for drunk driving. The oral reply official in addition knew that the employee drank to excess on occasion.

D: ESTABLISHING THAT THE EMPLOYEE WAS A QUALIFIED HANDICAPPED PERSON

The MSPB case law on "qualified handicapped individual" made a major change with *Hougens v. U.S. Postal Service*, MSPB Dkt. No. PH07528610373, 38 M.S.P.R. 135 (1988). Before *Hougens*, it was inconsistent to some extent. *Kulling v. Department of Transportation, F.A.A.*, MSPB Dkt. No. NY07528210213, 20 M.S.P.R. 56 (1984), held that drug use by an air traffic controller left him not qualified to perform his duties because of the agency's overriding concern for public safety. However, in several Board decisions in 1985 and 1986, the Board agreed with the appellants' claims that they were qualified handicapped individuals: *Velie v. Department of the Treasury*, MSPB Dkt. No. SF07528310996, 26 M.S.P.R. 376 (1985) (criminal investigator who pointed revolver at sheriff while drunk off duty); *Marren v. Department of Justice*, MSPB Dkt. No. DA07528510121, 29 M.S.P.R. 118 (1985) (Board Patrol agent who accepted gratuities and was convicted of drunk driving); *Friel v. Department of the Navy*, MSPB Dkt. No. PH07528510142, 29 M.S.P.R. 216 (1985) (police officer who threatened agency investigator with use of a gun); and *Green v. Department of the Air Force*, MSPB Dkt. No. CH07628610143, 31 M.S.P.R. 152 (1986) (nurse who stole and used controlled substances).

With *Hougens v. U.S. Postal Service* (discussed at more length in

Unit 2:A), the Board established different holdings on the question of the effect of egregious misconduct on an employee's qualification for the job, even though he or she is a handicapped person. The Board in *Hougens* specifically overturned *Velie, Marren, Friel,* and *Green* insofar as they held the appellants were qualified handicapped individuals.

E: WHAT CONSTITUTES A REASONABLE ACCOMMODATION?

Offer of Assistance

Ruzek v. General Services Administration, MSPB Dkt. No. SL075209017, 7 M.S.P.R. 437 (1981) held that in order to afford reasonable accommodation to an alcoholic or drug addicted employee, the agency must offer rehabilitative assistance and allow the employee the opportunity to take sick leave for treatment if necessary. This offer of assistance cannot be limited by improper requirements by the agency. A case in point here is *Avritch v. Department of the Navy*, in which the agency required the employee to sign disclosure forms before it would allow him to enter a counseling program he was otherwise willing to undertake. The Board found that the agency had not made a valid offer of assistance. (Agencies have successfully used last chance agreements where the employee agrees to a release of information in return for having an action held in abeyance. See section on last chance and other abeyance instruments in Unit 3.)

Delay of Proposal to Take Action

Ruzek v. General Services Administration also held that the agency **must** allow the employ the opportunity to complete a period of rehabilitation **before initiating any disciplinary action** for continuing performance or conduct problems related to his or her alcoholism. However, this requirement has been superseded to some extent by more recent cases which are discussed at more length in other sections.

Discipline Less than Removal as Accommodation

Hougens v. U.S. Postal Service announced a "major departure" from past precedent, holding that an agency may impose "reasonable discipline" **short of removal** for acts of misconduct while giving the employee an opportunity to rehabilitate. The Board in *Hougens* specifically overruled *Ruzek* and similar cases insofar as they prohibited agencies from imposing any discipline pending completion of a rehabilitation opportunity. In *Hougens*, it ruled that a reduction in grade to a position for which the employee is qualified can constitute reasonable accommodation if the agency can show that it could not keep an alcoholic or drug addict in

his or her job during rehabilitation efforts. Furthermore, the Board said it was adopting a "medically-recognized principle that one of the ways to help alcohol and drug abusers overcome their problem is to make them take responsibility for the consequences of their own actions."

A case in which the agency relied on *Hougens* to impose a lesser penalty on an individual whose misconduct was not egregious or disqualifying was reversed at the initial level by the administrative judge, who held that *Hougens* was **only** applicable with egregious or disqualifying conduct. The agency petitioned for review, and OPM intervened on the case. The Board issued its decision on OPM's intervention, modifying *Hougens* by saying that a lesser disciplinary action can only serve as a reasonable accommodation of an alcoholic employee if it is accompanied by a "firm choice" between treatment or the **initiation of removal**. However, the Board also cited with approval the case of *Smith v. Martin (Department of Labor)*, EEOC No. 03910017, February 11, 1991, where the agency, as part of an agreement, immediately suspended the employee and put its removal action in abeyance. EEOC found that the agency had offered a firm choice by the agreement. *(Banks v. Department of the Navy and Office of Personnel Management*, MSPB Dkt. No. PH075208910296, March 29, 1993.)

Another decision by the Board, *Vaughn v. Department of Veterans Affairs*, MSPB Dkt. No. NY07528910196, 50 M.S.P.R. 114 (1991), applied *Hougens* in its holding that the agency, while providing the employee a second chance to rehabilitate, could as part of a last chance with waiver of appeal rights, suspend the employee at the same time he was undergoing rehabilitation, rather than putting all action in abeyance. In this case, the employee tried to appeal the suspension, but the Board said that discipline less than removal met the definition of reasonable accommodation.

Firm Choice

For years, MSPB held that an agency need not provide a "firm choice" between accepting the agency's offer of rehabilitation or otherwise facing disciplinary action up to and including removal. See for example *Beverly v. Department of the Air Force*, MSPB Dkt. No. DA07528710314, 37 M.S.P.R. 520 (1988); and *McClain v. Department of the Air Force*, MSPB Dkt. No. HQ7121870024, 37 M.S.P.R. 653 (1988). Two court decisions went contrary to the Board, holding that an agency must provide a firm choice: *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff'd sub nom. Whitlock v. Brock*, 790 F. 2d 964 (D.C. Cir. 1986); and *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989). In 1989, citing *Whitlock* and *Rodgers*, EEOC adopted the principle of firm choice

in *Calton v. Stone, Secretary of the Army*, EEOC Petition No. 03900004, October 20, 1989; *Ruggles v. Garrett, Secretary of the Navy*, EEOC Petition No. 03840216, November 17, 1989; and *O'Brien v. Mosbacher, Secretary of Commerce*, EEOC petition No. 03850216, November 17, 1989.

Calton, the first EEOC decision which disagreed with MSPB by adopting the "firm choice" principle, concerned the case of an employee with a long history of alcohol-related misconduct, including AWOL and on-the-job intoxication. Citing *Whitlock v. Donovan* and *Rodgers v. Lehman*, EEOC noted that these decisions cover employees whose agencies have tolerated their handicapping conditions, but failed to accommodate by giving a firm choice between treatment and discipline, including removal. The Commission concluded that Calton's alcoholism did not prevent him from performing his job safely when he was not drinking. It found that the agency failed to show that providing a firm choice would constitute undue hardship. Following receipt of EEOC's differing decision, MSPB reversed its prior case law in *Calton v. Department of the Army*, MSPB Dkt. No. DE07528810362, 44 M.S.P.R. 477 (1990):

> "[T]he EEOC's decision to adopt the "firm choice" doctrine is not so unreasonable that it amounts to a violation of civil service law. Based on the EEOC's ruling in this appeal, we will henceforth require agencies to provide a "firm choice" between treatment and termination to employees handicapped by alcoholism."

Requirement for Firm Choice

All of the case law on "firm choice" **as a requirement** (e.g., *Whitlock*, *Rodgers*, *Calton*, *Holley*) concerns qualified handicapped employees who are **alcoholics**. Some agencies have given firm choices to employees who are addicted to drugs. For example, MSPB has held in *Harris v. Department of the Army*, MSPB Dkt. No. NY07529010047, March 29, 1992 that the firm choice requirements applies to individuals who are handicapped by drug use. In no case, however, is firm choice a requirement when dealing with individuals who are illegal users of drugs. In *Thomas v. Brown (Department of Veterans Affairs)*, EEOC held that current illegal drug users are not covered by the Rehabilitation Act; it appears that EEOC would find a firm choice not applicable to current drug abusers.

This distinction between alcoholics and drug addicts will likely remain true in light of ADA and its redefinition of individuals with handicaps as no longer covering persons who are currently

engaging in the illegal use of drugs.

Timing of Firm Choice

The Board's referral to a firm choice as being a choice "between treatment and termination" could be read to mean that a true "firm choice" could **only** be given at the point when the agency is removing an employee. This is very often the point at which an employee will finally admit to a drinking problem, for example, *Grassi v. Frank, Postmaster General*, EEOC Docket No. 01902389, September 7, 1990. However, in several decisions, EEOC made it clear that a firm choice can be given at a much earlier stage. *Ruggles v. Garrett, Secretary of the Navy* said the agency should have given a firm choice by proposing "formal discipline" and giving the employee "a clear understanding that more severe disciplinary action, i.e., removal, would be inevitable if he failed to successfully complete a treatment program." *O'Brien v. Mosbacher, Secretary of Commerce* held that the agency's memorandum accompanying an unsatisfactory performance appraisal **was deficient because no mention of removal was made**. *Robinson v. Frank, Postmaster General*, EEOC Decision No. 01890388, May 8, 1990, was particularly clear and specific concerning the time and methods of giving firm choice:

> "In light of appellant's chronic attendance problems and the agency's failure to discipline him, the agency should have given appellant a firm choice between his entry into a counseling or rehabilitation program, or termination. Such a choice ideally should have been given to appellant early in the process. When appellant arrived to work intoxicated in 1981, for instance, the agency should have presented him with the options of either following through with the treatment it had arranged or being terminated. Again, each time that appellant was referred to the agency's PAR or EAP program he should have been put on firm notice that if he refused to accept the referral or follow through with the program and if he continued to have performance problems, he would be subject to progressive discipline including termination. This the agency never did, which in turn aided appellant in denying his alcoholism and which also led appellant to believe that he could continue to drink without fear of losing his job."

A recent decision by the D.C. District Court, *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. December 9, 1991), differentiated between the agency's earlier allowing the employee to attempt treatment under his own initiative and its later active

intervention in his efforts. The court rejected the agency's claim that it had accommodated the employee for several years by allowing him to visit a counselor and take sick leave at his own initiative. But the agency's later provision of a ten-month "firm choice" when it became apparent that the employee was not going to be able by himself to overcome the adverse effects of alcoholism on his performance did in fact accommodate his handicap. He completed the firm choice period, then relapsed. The agency unsuccessfully tried to get him into treatment, but he only entered a program after the agency proposed his removal, and the agency then effected the removal without waiting until he completed the program. The court held that the mere fact he had entered the program did not preclude the agency from following through on its proposed removal. The court also held that an agency is not obligated to provide a treatment program for alcoholic employees as part of its affirmative action responsibilities. It sustained the agency's removal.

MSPB's holdings in *Harris v. Department of the Army* appear to muddy the water in that firm choice can only be between "treatment or termination," and must be given with any lesser disciplinary action (including presumably short suspensions).

Opportunity to Demonstrate Successful Rehabilitation

If an agency has allowed an employee to enter a rehabilitation program or otherwise initiates the opportunity for rehabilitation, the agency, under MSPB case law, must allow the employee time to demonstrate successful rehabilitation before removing the him or her. In *Chaplin v. Department of the Navy*, MSPB Dkt. No. SE04328610117, 35 M.S.P.R. 639 (1987), the employee had on five specific occasions declined the agency's offers of assistance, but finally accepted the offer of assistance the agency made after its proposed removal for unacceptable performance. The Board held that the agency could not effect its action without allowing the employee time to complete the rehabilitation program and demonstrate acceptable performance. In a slightly different situation, the agency in *Hodge v. Department of the Air Force*, MSPB Dkt. No. AT07528710817, 39 M.S.P.R. 174 (1988), had earlier provided the employee with rehabilitative assistance and an opportunity to show successful rehabilitation. The agency had denied the employee request for additional leave to attend a second rehabilitation program before its proposal to remove, but granted him leave and allowed him to enter the program after issuing the removal proposal. Again, the Board held that the agency discriminated against the employee by allowing him only two weeks after he completed his program before removing him. In both these cases, a **firm choice** (see above) might have provided a satisfactory solution to the agencies'

dilemma. For example, EEOC in *Johnson v. Garrett, Secretary of Navy* (above), in a very useful discussion held that the requirement for a reasonable opportunity to demonstrate success applies to cases like those above where the agency is attempting to effect discipline during the treatment for misconduct occurring **before** the treatment. Where the employee and the agency have entered a firm choice agreement:

> "[T]he agency is not required to forego discipline if the employee relapses, thereby violating a firm choice agreement. *See Felipe J. Ray v. Jack Kemp, Secretary, Department of Housing and Urban Development*, EEOC petition No. 03910045 (May 2, 1991) [91 FEOR 3401]. **To hold otherwise would in effect invalidate the meaning of firm choice."** (emphasis added)

However, *Callicotte v. Carlucci*, 698 F. Supp. 944 (D.D.C. 1988), held that one chance is not enough and the agency may have to offer another in the absence of a showing of undue hardship. A recent citation of *Callicotte* was made in the case of *Reilly v. Kemp (Department of Housing and Urban Development)*, 1991 WL 173183 (W.D. N.Y. August 29, 1991), which reversed the agency's action for not letting him participate in a third rehabilitation program, undertaken after the agency's offer of a firm choice.

Subsequent Reliance on Misconduct which Occurred before a Successful Rehabilitation Effort

In the absence of a settlement or abeyance action (see below), agencies may not rely on earlier charges or disciplinary actions in taking a new action after completion of an opportunity for rehabilitation. See *Rison v. Department of the Navy*, MSPB Dkt. No. DC07528211224, 23 M.S.P.R. 118 (1984); *Rhodes v. General Services Administration*, MSPB Dkt. No. PH07528410391, 27 M.S.P.R. 366 (1985). The D.C. District Court again held in *Walker v. Weinberger*, 600 F.Supp. 757 (D.D.C. 1985) that the agency cannot rely on pretreatment alcohol-related offenses when taking action based on later nonalcoholic misconduct after the employee's successful completion of rehabilitation. EEOC has affirmed the *Walker* holding in *Edwards v. Frank, Postmaster General*, EEOC Decision No. 05900636 (January 23, 1991).

Second Handicapping Condition Shown

In *Faber v. Department of the Army*, MSPB Dkt. No. SL07528710289, 38 M.S.P.R. 315 (1988), the Board required the agency to provide another opportunity to demonstrate rehabilitation, even though it had previously accommodated the employee's alcoholism, because his doctor had diagnosed a second handicapping condition of

chemical imbalance and depression, for which he was receiving treatment.

Thomas v. Brown (Department of Veterans Affairs), specifically concluded that if an employee is currently engaging in illegal drug use but has another handicapping condition he or she may be entitled to reasonable accommodation of the second condition, providing he or she meets all the tests of being an individual with a known handicapping condition who is a qualified individual and whose handicap is the sole cause of the misconduct or performance problem.

CHAPTER 3: DISCUSSION OF CASE LAW ON ALCOHOL AND DRUG ABUSE AS HANDICAPPING CONDITIONS
UNIT 2: AGENCY'S BURDENS

A: ESTABLISHING THAT ACTION WAS BASED ON A LEGITIMATE, NONDISCRIMINATORY REASON

No Causality or Nexus: Agency Action not Based on Employee's Handicap

Agencies should be aware of the possibility, if employees are able to establish a *prima facie* case of handicap discrimination, that they may be able to overcome the presumption of causality or nexus shown by employee as part of their initial burden. In an increasing number of cases, MSPB and EEOC are finding **no** causal connection between a handicapping condition of alcoholism or drug abuse and misconduct, even leave infractions. A number of representative decisions, including court, MSPB, and EEOC cases are presented below.

Often cited in later decisions is *Richardson v. U.S. Postal Service* 613 F. Supp. 1213 (D.D.C. 1985) which concerned an employee who was charged with assault with intent to kill his wife and himself. The agency suspended and later removed him when he pled guilty to an assault and weapons charge. The agency denied his grievance under the NGP, finding that the underlying off-duty misconduct was adequate cause for his removal, and that his return to an active duty status would not be in the best interest of the service. He then filed an EEO complaint, claiming that his supervisors knew of his alcoholic condition but failed to accommodate this handicap. When EEOC rejected his appeal, he appealed in the District Court for D.C., but the court held he had not established his claim that the agency's action was based on his alcoholism, since the agency removed him for his criminal misconduct, not because of his alcoholism or poor performance because of alcohol abuse:

> "The Rehabilitation Act only protects against removal `solely because of alcohol abuse.' (29 U.S.C., Section 794) It does not prohibit an employer from discharging an employee for improper off-duty conduct when the reason for the discharge is the conduct itself, and not any handicap to which the conduct may be related. . . . The Act does not create a duty to accommodate an alcoholic who is not `otherwise qualified,' i.e., commits an act which standing alone disqualifies him from service and is not entirely a manifestation of alcohol abuse. Nor does it provide any remedy for an employee who has been discharged for nondiscriminatory

> reasons and alleges that the employer failed to fulfill the duty to accommodate sometime in the past." (id. at 1215-1216)

MSPB relied on *Richardson* in *Brinkley v. Veterans Administration* (above), its lead case which requires the employee to demonstrate the causal connection between the agency's charges and an alleged handicapping condition of alcohol or drug addiction. In *Brinkley*, the agency removed a pharmacy technician for theft of a controlled substance (Darvon) from the worksite and for his off-duty misconduct (arrest on criminal charges including possession of the Darvon and driving while intoxicated, a second offense). The administrative judge (AJ) reversed the agency action, finding that the employee had proven that his handicapping condition caused the misconduct. In reaching this finding, the AJ cited the appellant's testimony that he stole the Darvon to help him off cocaine.

Considering the agency's petition for review, the Board agreed with the agency argument that the appellant failed to establish a causal connection between his handicapping addiction and the conduct charged, because he did not show he was under the influence of drugs when he stole the Darvon or later when he returned to work. The Board found that he did not prove he was suffering from any drug effects or consume the Darvon at the time he stole it. Even if he had proven he was suffering from the drug effects, the Board held that this tie was irrelevant to the criminal intent to commit theft:

> "Once this intent is proven, it is immaterial that the appellant may also have had some secondary or even overriding intent, which is more properly labeled a motive."

The Board also found that Brinkley failed to show that he was so impaired at the time of the theft that he lacked control over his actions, and failed to provide evidence that he was unable later to return the Darvon and asked for help. Thus, he did not establish the direct connection between his alleged handicapping condition and the misconduct.

In reaching this finding, the Board noted its adoption of the causation standard it applied in other handicap cases. It distinguished "between misconduct committed by a handicapped employee that is a manifestation of a mental or physical handicap, and misconduct committed by a handicapped employee that is not caused by the handicap." It stated also that its reliance on these earlier precedents was further supported by the "narrow scope and purpose of the Rehabilitation and Abuse Acts," which

give accommodation to employees from adverse actions based **solely** on their alcohol and drug use but do not prohibit the discharge or discipline of employees for misconduct when the action is based only on the conduct itself.

> "Any other rule would provide a shield for the drug and alcohol user from the disciplinary consequences of independent misconduct that non-drug users or alcohol consumers or physically and mentally handicapped employees who commit identical acts of misconduct cannot share. Nothing in the Act suggests that alcoholics and drug abusers should be treated more favorably in disciplinary situations than other physically or mentally handicapped or non-handicapped employees."

The Board found that the appellant did not show that any handicapping condition related to substance use "vitiated his intent to steal drugs," and that he therefore failed to establish a "direct connection" between the alleged handicapping condition and his misconduct.

The Board used this method of analysis in *Campbell v. Defense Logistics Agency*, MSPB Dkt. No. PH07528510377, 37 M.S.P.R. 691 (1988), in which the appellant was removed for unauthorized possession with intent to distribute a controlled substance (marijuana) and criminal and notoriously disgraceful conduct (arrest on agency premises for possession). The Board noted that she did not claim "that her analytical judgment or free will was impaired by drugs at the time she committed the sustained misconduct." She argued that she sold drugs to finance her own drug use, but she did not prove she was suffering from drug effects when she sold drugs. In addition, her claim of general dependence could not insulate her from discipline for willful acts of misconduct which were not based on her alleged drug addiction. As in *Brinkley*, once her intent to commit the misconduct was proven, the Board held it was immaterial whether she might have had a secondary intent or other motive. It found that she had not shown that at the time she possessed the drugs with intent to distribute, her mental facilities were impaired so that she lacked self control over her actions.

Hougens v. U.S. Postal Service also cited *Richardson v. U.S. Postal Service* with respect to the issue of causality. It also found that the employee's misconduct was "not entirely a manifestation of alcohol abuse." The appellant was not falling-down drunk at the time of the shooting incident, and he was aware that he pulled out his pistol, saw the four men run away, and recognized two of them. The Board concluded that the agency

properly held the appellant responsible for the misconduct.

In *Seibert v. Department of Treasury*, MSPB Dkt. No. PH07528810122, 41 M.S.P.R. 133 (1989), the Board cited its holding in *Brinkley v. Veterans Administration* that a claim of general drug or alcohol dependency cannot insulate an employee from discipline based on willful acts of misconduct not tied to the mental or physical impairment caused by the addiction, and amplified that holding:

> "The Board's causation standard, however, does not require an appellant to prove that his inebriated condition rendered him unable to have *mens rea*, the guilty mind of the criminal standard for innocence due to intoxication. Rather, it requires only that the appellant show that he was so impaired by alcohol or drug intoxication at the time of his misconduct that he lacked control over his actions."

Seibert did not prove he was under the direct influence of drugs or alcohol at the time of the misconduct. He did not show that his misconduct was the concurrent product of mental or physical impairment caused by addiction or that he did not know fully what he was doing. His argument that he suffered impaired judgment and compulsion to obtain funds as a result of his addiction did not meet the causation standard for proving discrimination based on a handicapping condition. Because his repeated thefts of funds occurred independently and separately from his alleged addition, the agency had no obligation to provide him accommodation.

In an important decision, *Malbouf v. Department of the Army*, MSPB Dkt. No. NY07528610058, 43 M.S.P.R. 588 (1990), the agency removed the employee for failure to maintain the Government driver's license required for his job. The state had revoked his state license for at least a year because he refused a breathalyzer test after his arrest on suspicion of driving while intoxicated, and the agency revoked his Government license because of his failure to maintain a valid state driver's license. He was removed after the agency determined that it was not cost effective to have a fellow worker continue to drive him to his work sites. The Board first found that the appellant was not a **qualified** handicapped person in that by failing to maintain a condition of employment necessary to perform his essential duties, he was no longer technically qualified for his position. Even assuming that he was qualified, he did not prove that his failure to maintain the necessary driver's license either was "caused" by or was "entirely a manifestation of" his handicapping condition. The Board held:

> "The appellant was not removed because he was an alcoholic or even as a result of his arrest on suspicion of driving while intoxicated, which one could argue is a manifestation of alcoholism. Rather, he was removed because he failed to maintain a current driver's license, which was a direct result of his own action in refusing to take a breathalyzer test after his arrest. The appellant has adduced no argument or evidence that his refusal to take the test was caused by alcoholism or even intoxication at the time. Nor did he show that he lacked control over his actions when he refused to take the test. Hence, the appellant's failure to meet an essential condition of his employment and his resulting removal were due to his own intentional and volitional actions and not solely because of his alcohol abuse."

In *Milner v. Department of the Navy*, MSPB Dkt. No. NY07528710529, 45 M.S.P.R. 163 (1990) , the employee claimed that the agency failed to provide accommodation of his handicapping condition of alcoholism. The Board considered the question of a causal connection between his handicap and the agency's AWOL charges. The appellant had admitted that he had reasons for his absence from work on the days in question entirely unrelated to his alleged alcoholism: home electrical problems, a dental appointment, and illness. Even though he said he had been drinking on the nights before and days in question, "he did not state that he was too inebriated to work or explain exactly how his drinking otherwise contributed to his absences from work. . . . Moreover, the appellant produced no medical evidence to connect the `viral gastroenteritis' that he suffered [on two days] to his alcoholism, attributing the illness instead to a reaction to the novocaine used in his dental treatment."

Gleim v. U.S. Postal Service, MSPB Dkt. No. NY07528810312 (1991), held that it would not establish a *per se* rule that on-the-job drinking or drug use is entirely a manifestation of an employee's addiction. It found that such a determination depends on the circumstances surrounding the use. "Proof of an isolated drink or two on the job, however, may not suffice without specific evidence that the employee could not stop himself."

LaValley v. U.S. Postal Service, MSPB Dkt. No. BN07528810117, June 19, 1991, applied *Brinkley v. Veterans Administration* and *Hougens v. U.S. Postal Service* to find that the appellant failed to establish that his handicapping condition caused his handicapping condition. In this case, the Board found that the appellant could maintain control of his faculties and continue working "even while under the influence of the 2-4 beers he

consumed during lunch." It noted its previous holding in *Hougens* that the employee must show that he was not only under the influence of alcohol but was also "intoxicated to such an extent that his cognitive and physical faculties were so impaired as to deprive him of all understanding of the consequences of his actions." Since the employee was unable to make these showings, there was no direct connection between his alcohol and the misconduct. The Board stated it need not reach the agency's argument that the nature of the employee's misconduct (opening first-class sealed mail and passing the contents to coworkers) disqualified him from accommodation. (EEOC concurred in this decision, finding that the employee's consumption of beers at lunch had not rendered him so inebriated that he was unaware of committing serious violations of Postal Service regulations. He also failed to show he was having trouble performing his duties on the day of the incident. The Commission concluded that there was no causal connection between his alcoholism and the charged misconduct. *LaValley v. Frank, Postmaster General*, EEOC No. 03910117, October 31, 1991)

The Board continues to follow this line of reasoning. *Harbo v. U.S. Postal Service*, MSPB Dkt. No. NY07528610497, March 27, 1992, was a case of an employee who was removed for charges of possession and distribution of marijuana (this charge not sustained on appeal) and AWOL. The Board held that the agency was aware of his confinement by a court in a custodial drug rehabilitation program. Though the agency learned of his confinement before his removal, the Board found that it had not been aware of the employee's whereabouts or the reason for his absence at the time it charged him AWOL; the Board concluded the agency had properly charged his absence to AWOL. With respect to the AJ's holding that the employee was a qualified handicapped person based on his drug use, the Board found no causal connection between the sustained charge of AWOL and the alleged handicap. "There is no evidence that the appellant was so impaired by drug use he could not inform the agency of his status and request leave. Nor has he shown that he was prevented from doing so by the conditions of his confinement in the rehabilitation center." The Board mitigated the removal to a 30-day suspension because not all the charges had been sustained. In *Rivers v. Department of the Navy*, MSPB Dkt. No. PH07529010688, May 19, 1992, the Board found that the employee, though a handicapped person because of his alcohol and drug addictions, did not show the causal connection between his failure to notify the agency why he was absent or his submission of fraudulent sick leave slips, because he was able to contact his doctors office when he was ill. (See also *Valdez v. Frank, Postmaster General* below.) Most recently, *Rednall v. Department of the Army*, SE07529110266, June 24, 1992, held that the fact the employee's

license was suspended because of his DWI conviction did not mean that his concealing the suspension from the agency and his driving agency vehicles without a license were directly connected to his alcoholism. Thus, the agency was not required to postpone his removal for 90 days under its own regulation which required this delay when the agency's action was related to alcohol use.

A comparison of decisions by the EEOC with those of MSPB and the court in *Richardson v. U.S. Postal Service*, discussed above, reveals a uniformity of methods of analysis, consistent across a fairly lengthy period of time. For example, in *Turner v. Department of the Army*, EEOC Petition No. 03830069, Nov. 1, 1983, EEOC considered MSPB's affirmation of a removal, finding among other things that the appellant, though handicapped, "denied any state of intoxication as a direct or contributory factor in his behavior that day."

Again, in *Davis v. Frank, Postmaster General*, EEOC Petition No. 03890071, July 14, 1989, EEOC held that the employee failed to show the necessary causal relationship between his handicap and the criminal misconduct. He did not claim he was high on drugs at the time he sold the cocaine to the Postal Inspector, or propose even a "tenuous relationship" between his drug dependency and the sale. The Commission noted that the record showed the employee's primary motivation was the desire to enter into a very good deal and made it clear that the agency removed the employee solely because of his criminal conviction, not his chemical dependency, which he never made known to his supervisor until a year later.

Terry v. Garrett, Secretary of the Navy, EEOC Petition No. 03890064, September 25, 1989 (the MSPB decision was discussed above with respect to an agency's obligations when an employee raises drug abuse before the agency takes action) assumed that there might be a handicapping condition in order to examine the question of the nexus between the employee's impairment (drug abuse) and the charges supporting the removal action. The Commission found a connection between the first charge of drug possession and the handicapping condition, but found that there was **no** connection between the employee's drug abuse and the charge that she was disobedient and resistant to constituted authority. Because the agency official testified that any one of the charges was enough to support a removal, the Commission concurred with MSPB that the agency's action did not constitute prohibited handicapping discrimination.

Valdez v. Frank, Postmaster General, EEOC Dkt. No. 03890033, November 17, 1990, concerned a removal for failure to maintain a regular work schedule, with consideration of many past

disciplinary actions related both to leave infractions and on-the-job misconduct. One agency charge was AWOL, when the employee failed to request leave before entering an inpatient treatment program without the agency's knowledge. MSPB affirmed the removal, and the employee petitioned EEOC for review. The Commission, considering the employee's petition for review, found that he was a qualified handicapped employee, but that he had not established the causal relationship or nexus between his handicapping condition and the agency's reasons for removal. The record showed that the agency removed the employee because he failed to request leave in advance of his admission to the treatment program, even though he had an opportunity to do so. The Commission found no evidence showing that the employee was incapacitated by his substance abuse and therefore unable to request leave properly before entering the hospital, and concluded that the employee did not establish that his handicap caused his attendance-related misconduct.

More recently, EEOC found no causal connection in a case where the agency had removed the employee for using profane and abusive language and for incidents of bizarre misconduct. The employee claimed that the agency's action was based on his handicapping conditions of drug and alcohol abuse, paranoid schizophrenia, and antisocial personality disorder. The Commission agreed with MSPB that the employee had not established that his judgement or free will were impaired by his intoxication and possible failure to take his psychiatric medicine at the time of the incidents. The Commission footnoted the change made to the Rehabilitation Act by ADA to exclude individuals currently engaging in the illegal use of drugs. *Lee v. Frank, Postmaster General*, EEOC 03910121, December 18, 1991. Citing its decision in *LaValley v. Frank, Postmaster General*, the Commission in a later decision held that though the appellant was an alcoholic in that he was able to show medical evidence of alcoholism and his treatment, he had not shown the causal nexus between his alcoholism and his misconduct involving falsification of an employment application. "Although petitioner testified that he was under the influence of alcohol when he completed his employment application . . . , petitioner did not present any persuasive evidence to corroborate his assertions." The Commission said his assertion of diminished capacity on that day was questionable because he had only one question with an error or omission on the entire application, specifically the one he had falsified. *Whitehead v. Frank, Postmaster General,* EEOC Dkt. No. 03920033, April 2, 1992.

Employee Not "Qualified Handicapped Person"

As noted in Unit 1:D, *Hougens v. U.S Postal Service* established new holdings on the question of the effect of egregious

misconduct and other types of conduct adversely affecting an employee's job performance. The case concerned the mitigation of a Postal Inspector's removal to a demotion, based on the employee's reckless endangerment of the lives of others by pointing his automatic pistol at four unarmed people and firing it at a fleeing person. He was carrying a concealed weapon not licensed by the state. His job required him to carry a weapon. Citing *Richardson v. U.S. Postal Service*, 613 F.Supp. 1213 (D.D.C. 1985), the Board held that:

> "[T]here are certain acts of misconduct which, when committed by an employee who is an alcoholic or drug addict, take that employee outside the scope of the protecting legislation because the misconduct renders that person not a "qualified" handicapped individual. . . . An "otherwise qualified" individual with a handicap is one who, despite his handicap, is technically, physically, mentally, emotionally, and morally fit to perform the duties of his position. When the agency proves that the appellant's misconduct, standing alone, disqualifies the appellant from his position because it impacts on one of these elements of performance, the Board will sustain the action even in the absence of an opportunity to rehabilitate."

Since *Hougens v. U.S. Postal Service*, the Board has issued several important decisions on the subject of **qualified** handicapped individuals. *Wilber v. Department of the Treasury*, MSPB Dkt. No. DE07528810247, 42 M.S.P.R. 582 (1989) concerned an employee whom the agency removed for misuse of a Government vehicle, conduct prejudicial to the Government, and loss of his Government driver's license. These charges were based on an accident while the employee, a criminal investigator, was driving his Government vehicle. He was driving on the wrong side while intoxicated, and collided with an oncoming car, resulting in the death of a two-year old child in that car. He was arrested for driving under the influence and homicide by vehicle, and pled guilty to these charges. The initial decision reversed the agency action, finding that the agency knew of the employee's handicap of alcohol abuse and should have considered accommodating him. The Board sustained the agency action, agreeing with the agency that *Hougens* was applicable in this case because the employee's misconduct was sufficiently egregious that he was not a "qualified" handicapped person covered by the Rehabilitation Act, even though he was handicapped.:

> "The question of an agency's knowledge of an employee's handicap is a separate question from whether the employee is a qualified handicapped individual. Thus,

> an employee may not bootstrap his proof regarding the first requirement--the agency's knowledge of his handicapping condition--to establish the second requirement--that he is a qualified handicapped individual."

Subsequently, in *Wilber v. Brady, Secretary of the Treasury*, EEOC No. 039000033, July 13, 1990, EEOC has concurred with the Board's decision, agreeing that, because of the nature of his misconduct, the employee failed to establish that even with reasonable accommodation he could perform the essential functions of his position without endangering the health and safety of himself and others. The Commission agreed with the Board's finding that his egregious misconduct, combined with the nature of his duties as a law enforcement officer, rendered him not qualified.

In *Malbouf v. Department of the Army*, the Board also ruled on the issue of whether an employee is a **qualified** handicapped person. It held:

> "[B]y losing his driver's license, the appellant failed to maintain a condition of employment necessary to perform his essential duties. Accordingly, because the appellant was no longer technically qualified for his position, the agency was under no obligation to accommodate him."

Most recently, in *Thompson v. Department of Justice*, MSPB Dkt. No. AT07528910468, 51 M.S.P.R. 43 (1991), the Board held that the appellant's conviction of driving while intoxicated and possession of marijuana render him, under *Hougens v. U.S. Postal Service*, disqualified for accommodation because these offenses struck at the core of his job (recreational specialist at a Federal prison) and the agency's mission. The Board affirmed the agency's removal action.

The issue of whether an appellant is qualified also overlaps the issue of whether the requested accommodation is reasonable (discussed in the next paragraph). Basically, an employee may not be able to show that he or she is **qualified** because the agency can show that the employee's suggested accommodation would be an undue burden on agency operations. See for example *Kulling v. Department of Transportation, F.A.A.*, MSPB Dkt. No. CH07528210387, 24 M.S.P.R. 56 (1984), which concerned an air traffic controller with a handicapping condition of drug abuse. The Board found that allowing the employee to continue controlling traffic while undergoing rehabilitation would endanger the health and safety of himself and others, and that thus he could not perform the essential duties of the position

and was not qualified. Equally, it appears the findings in the case could have been that the accommodation suggested--time on the job for rehabilitation--would place an undue hardship on the agency. In *Robinson v. Office of Personnel Management*, 37 FEP 729 728 (D.D.C. 1985), a printing press operator continued to come to work drunk even after repeated offers of help and the cancellation of one removal action accompanied by a firm choice. The court found that he was not a "qualified" handicapped person because his repeated instances of on-the-job intoxication meant that he could no longer operate potentially dangerous printing presses without danger to himself and/or others.

EEOC also found an alcoholic special agent of the Secret Service not to be a qualified handicapped individual (*Miskinis v. Department of the Treasury*, EEOC Dkt. No. 03840102, June 27, 1985) The employee had been repeatedly counseled, offered assistance, had actions mitigated, even given an adjusted work schedule to attend a clinic for alcoholics, all to no avail. Eventually he was diagnosed as being an acute paranoid schizophrenic in addition to being an alcoholic, and the Commission agreed that there was no way he could perform the duties of his position, which included carrying a weapon, without endangering himself or others. In *Hill v. U.S. Postal Service* (above), the Commission, without ruling specifically, stated that it was questionable whether the employee was a qualified handicapped person in light of his assault of a female coworker.

The First Circuit recently decided a case of an employee removed for possession of heroin with intent to distribute who claimed he was handicapped by his drug addiction. Arbitration, EEOC, and MSPB all sustained the agency's action on review, and he appealed to court. The First Circuit found he was not a qualified handicapped person because the agency could not accommodate his handicap of drug addiction without sacrificing its employment standards, which prohibited its employees in engaging in criminal conduct. In addition, he had never made the agency aware of his drug addiction until long after completion of the criminal investigation. In a footnote, the court, as EEOC had done in *Lee v. Frank, Postmaster General*, noted the change made to the Rehabilitation Act by ADA to exclude current illegal drug users. *Taub v. Frank, Postmaster General*, No. 91-1689, February 18, 1992.

B: ESTABLISHING THAT SUGGESTED ACCOMMODATION WOULD BE UNREASONABLE

Undue Hardship

In some cases a suggested accommodation would constitute an undue

hardship and thus would be unreasonable. There are relatively few substance abuse cases where the decision hinges on the question of undue hardship aside from that of "qualified" handicapped person. *Cavallaro v. Department of Transportation*, MSPB Dkt. No. NY07528210213, 20 M.S.P.R. 701 (1984), concerns a computer systems analyst who was removed based on five charges: reckless operation of a motor vehicle; driving while intoxicated; attempting to inflict bodily injury; willful damage to Government property; and unlawful possession of a loaded firearm--all on agency premises. The decision found that retention in his position would result in undue hardship to agency personnel and property because of the nature of his misconduct. It appears that the finding could equally have been that he was not a "qualified" handicapped employee. *Hougens v. U.S. Postal Service*, which found the employee not qualified, also found that to return the employee to his former position would impose an undue hardship to the agency because of the nature of his misconduct, even though the agency was able to demote him to another position not requiring him to carry a gun. *Miskinis* also contains a statement by EEOC that though the issue was not reached in the case, the Commission would also find that to require the agency to accommodate the employee's handicapping condition further would impose an undue hardship on the agency, considering the "very sensitive nature of the work of a Secret Service Agent, along with its obvious potential for danger. . ."

Employee's Refusal of Accommodation Offer

Because of the Board's decision in *Calton v. Department of the Army* to adopt the principle that an agency must give an alcoholic employee a "firm choice" before removing him or her, the Board's earlier decisions are not necessarily applicable concerning whether the employee's refusal of an offer of counseling or treatment constitutes the refusal of accommodation. The EEOC's decision in *Loveland v. Department of the Air Force* found that the agency had given her a firm choice by offering to hold her removal in abeyance if she entered treatment. She refused, denying she was an alcoholic. The Commission held that the agency had satisfied its burden to try to accommodate her alcoholism.

Employee's Failure to Complete Rehabilitation Satisfactorily

More common than the employee's outright refusal of rehabilitation is acceptance without real commitment and/or a subsequent failure to complete the rehabilitation effort successfully. *Fuller v. Frank* (see above) is an example of an employee's violation of a last chance agreement after the agency had allowed him to obtain several different levels of treatment.

In this case, the court held specifically that the agency is not required to hold off action once it has given an employee a firm choice and he or she fails rehabilitation:

> "Fuller also contends that he entered a treatment program before his removal became effective and that the Postal Service should have awaited the outcome of this treatment or reinstated him. While the Postal Service had the option of doing so, reasonable accommodation did not require such an action. Fuller's previous attempts at recovery had not been successful and there was no guarantee that this one would have been successful either. In addition, if Fuller's approach were the law, an employee could conceivably forestall dismissal indefinitely by repeatedly entering treatment whenever dismissal becomes imminent due to a relapse. The last chance agreement would have become meaningless had Fuller been allowed another chance to obtain treatment after having been informed that further violations would not be tolerated. The Postal Service was not required to provide Fuller with another chance after having given him a `last chance'."

In *Stephens v. Frank, Postmaster General*, EEOC Dkt. No. 03880040, January 8, 1990, EEOC made a similar holding on the agency's action to remove the employee after an earlier mitigation of a removal to a suspension coupled with a firm choice. Stephens dropped out of the Employee Assistance Program after two sessions, and then began drinking on the job.

> "The Rehabilitation Act does not require that the agency offer petitioner an endless series of accommodations. The agency was not required to continue to employ petitioner until he successfully completed an alcohol rehabilitation program when his alcohol related conduct could impugn the integrity of the agency in the eyes of the public."

Grassi v. Frank, Postmaster General (above), concerned an employee, given a last chance agreement, who needed inpatient treatment but failed to get it or request leave from the agency to do so before her removal. She subsequently entered the program before she was removed, but did not tell her supervisors before the removal was effective.

However, in *Reilly v. Kemp (HUD)*, 1991 WL 173183 (W.D.N.Y. 1991), the employee's failure to carry out one provision of the agreement (that he see a specific physician) while carrying out the rest of the treatment program and maintaining acceptable

performance and conduct on the job was not enough for the agency to remove him for violation of the last chance, firm choice agreement. The court found the agency to be premature because he had not relapsed on the job.

Subsequent Rehabilitation Opportunity Requested

Generally, the case holdings have been that once agencies have given employees one opportunity to demonstrate rehabilitation, they are not obligated to provide a second or subsequent opportunity. See *Brann v. U.S. Postal Service*, MSPB Dkt. No. NY07528410079, 25 M.S.P.R. 83 (1984); *Stephens v. Frank, Postmaster General*; *Girani v. Federal Aviation Administration*, 924 F.2d 237 (Fed. Cir. 1991). See also *Gallagher v. Catto*, above on the issue of completion of a rehabilitation program once the agency has allowed the employee to complete an earlier attempt. But see the discussion of *Callicotte v. Carlucci* and *Reilly v. Kemp (Department of Housing and Urban Development)* in the section entitled "Opportunity to Demonstrate Successful Rehabilitation."

Employee's Successful Completion of Treatment After Removal

The employee in *Campbell v. Defense Logistics Agency* claimed that her documented successful completion of a rehabilitation program subsequent to her removal for substance abuse related misconduct entitled her to another chance to do her job. The Board, however, clarified that these rehabilitative efforts were irrelevant to the case since they began and were completed after the removal was effected. See also *Thomas v. Brown* where the employee's "after the fact" entry into treatment and subsequent rehabilitation did not mean the agency could not take action on the drug-related misconduct.

CHAPTER 3: DISCUSSION OF CASE LAW ON ALCOHOL AND DRUG ABUSE AS HANDICAPPING CONDITIONS

UNIT 3: ABEYANCE INSTRUMENTS INCLUDING "LAST CHANCE" AGREEMENTS AND SETTLEMENT--ISSUES WITH RESPECT TO THEIR USE

MSPB, EEOC, and the courts have affirmed the principle of abeyance instruments, either unilateral agency decisions to hold actions in abeyance or bilateral "last chance agreements" entered into by employees and agencies. These abeyance instruments can serve to provide employees with the required "firm choice" and may be the only way to get employees into treatment and rehabilitative efforts.

A: DECISIONS OR ACTIONS IN ABEYANCE

If employees raise substance dependence as an affirmative defense in a reply to an adverse or performance-based action proposal, agencies may choose to offer a last chance before making their decisions. *Kean v. Department of the Army*, EEOC Dkt No. 03850053, March 11, 1988 (MSPB Dkt. No. PH07528410146) found that the agency had not accommodated the employee when it issued its decision without taking into account his response to its proposal to remove in which he finally admitted his alcoholism and noted his entry into a treatment program. EEOC held that the agency had allowed him to enter treatment before making its decision and should have notified the employee "that its disciplinary decision would be deferred pending a reasonable period during which petitioner must show a favorable response to the treatment he received." *Girani v. Federal Aviation Administration* also pertained to a last chance given after the proposal and before the agency's decision was made.

More commonly, agencies make their decisions on the proposals but put the decided **actions** in abeyance. See *Walton v. Department of the Navy*, MSPB Dkt. No. PH075283100654, 24 M.S.P.R. 565 (1984); *Brann v. U.S. Postal Service*; and *Gonzalez v. Department of the Air Force*, MSPB Dkt. No. DA07528710344, 38 M.S.P.R. 162 (1988); *Grassi v. Frank, Postmaster General* (above).

B: UNILATERAL VERSUS AGREED-UPON LAST CHANCE TERMS

Agencies may unilaterally issue an abeyance letter or decision, as in *Walton v. Department of the Navy*. *Smith v. Martin (Department of Labor)*, EEOC No. 03910017, February 11, 1991, also contained an agreement which the employee did not sign, but EEOC found that the agency had offered a firm choice by the agreement. See further discussion of *Smith* with respect to lesser discipline as reasonable accommodation. Another recent EEOC decision had a

unilateral notice of abeyance which the agency gave to a drug addicted employee. *Johnson v. Garrett, Secretary of Navy*, EEOC No. 03910140, March 6, 1992. Finally, a recent decision by the Board on an employee's appeal of an arbitrator's award provides an interesting variation on the unilateral theme. The agency removed the employee based on AWOL and forging medical notes. The arbitrator found that the employee's misconduct was the product of alcohol and drug abuse and that the employee could be "cured" by completing a long-term inpatient rehabilitation program he had already entered. The arbitrator then converted the removal to a suspension to last the duration of the inpatient treatment program. His award provided that the employee must show up for work, consent to weekly random urinalysis tests and to their release, continue his rehabilitation on an outpatient basis, and suffer no setbacks in his rehabilitation program. If the employee failed to meet any of these provisions, the agency could remove him with no further procedures, appeal rights, or accommodation. Citing *Calton v. Department of the Army*, the Board blessed all these provisions except for the unilateral denial of future procedural and appeal rights. It deleted that provision, holding that it deprived the employee of minimum due process without his consent. *Coleman v. Department of Veterans Affairs*, MSPB Dkt. No. HQ71219010033, November 13, 1991.

However, "last chance" agreements arrived and signed by employees and/or their representatives are more widely used: *Ferby v. U.S. Postal Service*, MSPB Dkt. No. AT07528211068, 26 M.S.P.R. 451 (1985); *Gonzalez v. Department of the Air Force*; and *Stout v. Frank, Postmaster General*, EEOC Dkt. No. 01900204, July 20, 1990 (employee's representative but not employee signed the agreement, but employee was bound by it, EEOC found).

C: LESSER DISCIPLINE IN LIEU OF REMOVAL IN LAST CHANCE AGREEMENT

In *Romano v. U.S. Postal Service*, MSPB Dkt. No. SF07529010505, 49 M.S.P.R. 319, (1991), a last chance agreement provided for effecting a 21-day suspension as well as holding the removal action in abeyance. It also provided for subsequent removal "without recourse to any administrative or judicial appeal procedures" if the employee violated the agreement. The employee did not challenge the immediate suspension but filed an appeal when the agency subsequently determined he had violated the agreement, and effected the action without further procedures. The Board did not disagree with the AJ's findings that the waiver of appeal rights under these circumstances was valid, but remanded the case for a determination of whether the misconduct for which the employee was terminated did in fact violate the agreement. The Board stated that if not, the appeal would be within its jurisdiction.

EEOC has affirmed an agency's use of settlements which required the appellant to participate in the agency's counseling program as a condition of reducing a proposed removal to a suspension. See *McClendon v. Frank, Postmaster General*, EEOC Dkt. No. 01903225, October 23, 1990, in which EEOC specifically noted that this choice of following through with treatment **and** being suspended or else face removal constituted "firm choice"; *Stephens v. Frank, Postmaster General*, EEOC Dkt. No. 03880040, January 8, 1990; and *Hill v. U.S. Postal Service*, EEOC Dkt. No. 01863080, January 28, 1988. Most recently, the Commission upheld a case in which a last chance agreement provided for an immediate suspension in lieu of removal but with removal without appeal rights if the employee did not live up to the agreement. (*Smith v. Martin (Department of Labor)*, EEOC Dkt. No. 03910017, February 11, 1991)

D: VIOLATION OF ONE OR MORE TERMS OF THE AGREEMENT

Case law has held that any conduct or failure to live up to the agreement does **not** have to be related to substance addiction. See, for example, *Rhodes v. General Services Administration* (failure to follow proper leave requesting procedures and AWOL not related to alcoholism); *Hill v. U.S. Postal Service* (sexual advances to coworker and sleeping on job not claimed to be alcohol related).

A later decision by MSPB concerned a last chance agreement which did **not** contain a waiver of appeal rights. The agency had proposed the removal of an air traffic controller after he tested positive for cocaine in a random drug test taken as part of an agency-wide drug testing program. He admitted his cocaine use, agreed to enter a rehabilitation program, and agreed to submit to random drug screening. The agency held the action in abeyance, telling the employee that any further illegal drug involvement would result in removal. Subsequently, the employee provided a sample in an unannounced follow-up test, which tested positive for marijuana. The agency thereupon effected his removal for violation of the terms of the abeyance letter. He claimed that the positive test resulted from his passive inhalation of someone else's marijuana smoke, and that therefore, he had not "used" marijuana. Furthermore, he claimed, he had been coerced into agreeing to random testing as part of the abeyance agreement. The Board found the follow-up testing was done in accordance with the terms of the abeyance letter, and that there was no evidence that his decision to agree to the testing was coerced. It found that the employee had actually used drugs and thus violated the terms of his agreement. *Shelledy v. Department of Transportation*, DE07528810381, June 21, 1991.

E: EFFECTING THE ACTION IF TERMS OF AGREEMENT OR ABEYANCE DECISION BREACHED

If agencies have placed actions in abeyance, given employees a reasonable time for rehabilitation efforts, and the employees fail to meet one or more of the required conditions (acceptable performance, conduct, leave, or participation in required rehabilitation programs), MSPB, EEOC, and court decisions have held that agencies may reinstate the original action without issuing a new proposal notice or giving other procedural rights: *Walton v. Department of the Navy*; *Brann v. U.S. Postal Service*; *Grassi v. Frank, Postmaster General;* and *Girani v. Federal Aviation Administration*.

F: WAIVER OF THIRD-PARTY REVIEW RIGHTS

MSPB and the Federal Circuit Court of Appeals have affirmed the waiver of appeal rights by employees as part of the terms of a last chance or settlement agreement: *Ferby v. U.S. Postal Service*; *McCall v. U.S. Postal Service*, 839 F. 2d 664 (Fed. Cir. 1988). A later case, however, shows that the Board looks carefully at the terms of the agreement to see how much the employee has waived. In *Pryor v. Department of the Navy*, the agency had given the employee a last chance when he raised alcohol dependency in his response to a proposed removal and informed the agency he had completed a drug treatment program. The agency subsequently effected the removal by a decision letter which concluded the appellant did not satisfactorily complete an agency-approved treatment program and also had two days of AWOL. The employee claimed he did not violate the agreement and that he had not had a chance to reply to the AWOL "charges." The administrative judge dismissed his appeal, finding that the appellant made an intentional and informed waiver of his right to appeal to the Board. No, said the Board, the employee's waiver in this case applied only to the facts underlying the original removal and whether it was properly taken, and the employee did **not** waive his right to "contest breach of the agreement itself." Considering the appellant's arguments that he should not have been charged AWOL for the two days, the Board found he had raised a non-frivolous allegation that he had not breached the agreement, and it remanded the case for further adjudication.

EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) (cited by *Royal v. Sullivan*); *Callicotte v. Carlucci*; and most recently, EEOC's *Royal v. Sullivan, Secretary, Department of Health and Human Services*, EEOC Dkt. No. 01903626, September 5, 1990, have held that it is invalid as against public policy to waive **prospective** EEO rights in an otherwise valid release or agreement. *Royal* concerned an employee whose representative had

agreed to a waiver of current and future appeal and review rights in any forum. The employee had been given a last chance to demonstrate successful rehabilitation, but subsequently was AWOL again. After the MSPB dismissed the case for lack of jurisdiction, EEOC found that the issue of whether an employee could waive future **EEO** complaint rights should be settled through the EEO process, not the mixed case process. The EEOC held as follows:

> "EEOC regulations encourage voluntary resolutions of EEO complaints but a complainant may validly waive **only** those claims arising from "discriminatory acts or practices which antedate the execution of the release." *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986), quoting *Allegheny-Ludlum*, 517 F.2d 826 (5th Cir. 1975). Thus, an otherwise valid release or agreement that waives prospective Title VII rights is invalid as violative of public policy. See *EEOC v. Cosmair, Inc.,* 821 F.2d 1085 (5th Cir. 1987) (waiver of right to file EEOC charge is void as against public policy); *Williams v. Vukovich*, 720 F. 2d 909 (6th Cir. 1983) (consent decree containing impermissible waivers of future discrimination claims held invalid); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (an employee's rights under Title VII are not susceptible to prospective waiver). Accordingly, we find that in the present case the portion of the agreement that stipulated that appellant waived "her right to ... file an EEO complaint or to pursue the matter under any other forum" is invalid and unenforceable. In other words, by her representative's signature of July 25, 1989, appellant could waive only those EEO claims arising "on or before" that date; she could not, however, waive her rights to challenge any **future** actions." (emphasis in original)

In *Smith v. Martin (Department of Labor)*, EEOC cited *Royal v. Sullivan, Secretary, Department of Health and Human Services*, as standing for the Commission's disallowance of waivers of prospective rights. However, in *Smith*, the Commission said that all it was focusing on is whether the employee entered a last chance agreement knowingly and of his own accord, and concluded that the employee had done so. Two very recent decisions from EEOC have held that while an employee can waive the right to pursue EEO claims arising on or before a settlement is reached, the employee may not waive his or her rights to challenge future actions, i.e., any allegation of breach of the settlement agreement or a determination on an alleged breach of settlement. In *Mole*, the agreement expressly stated that the appellant did

not waive his right to seek enforcement of the agreement. *Parks v. Rice, Secretary of the Air Force*, EEOC No. 019222942, June 1, 1992; *Mole v. Department of the Treasury*, EEOC No. 05920235, June 4, 1992.

MSPB has held that settlement agreements arrived at after the decision is made but before the action is effected can include a waiver of appeal rights which the Board will honor: *Gonzalez v. Department of the Air Force*. Settlements reached during the appeal process also may include waivers of appeal rights: *McCall v. U.S. Postal Service* and *Ferby v. U.S. Postal Service*, above. However, the same problem arises again--holdings by EEOC and a few courts on the waiver of prospective EEO rights.

CHAPTER 3: DISCUSSION OF CASE LAW ON ALCOHOL AND DRUG ABUSE AS HANDICAPPING CONDITIONS

UNIT 4: "CONDITIONAL REEMPLOYMENT" WHEN AGENCY HAS NOT ACCOMMODATED AN EMPLOYEE'S HANDICAPPING CONDITION

In a series of decisions, EEOC, as part of its compliance order when reversing agencies' actions for failure to accommodate employees' handicapping condition, has determined that conditional reinstatement would be the appropriate remedy. In *Ruggles v. Garrett, Secretary of the Navy* and *O'Brien v. Mosbacher, Secretary of Commerce*, the Commission required the agency to offer reemployment without back pay, if the employee was rehabilitated and continuing with treatment. *Barr v. Marsh (Department of the Army)* ordered an offer of reinstatement **with** back pay pending a determination that the employee successfully completed the inpatient treatment and continued to abstain from drugs. If she was qualified but there were no vacancies, the Commission recommended **front pay** until she was offered an available position.

The Board cited these EEOC decisions in *Calton v. Department of the Army* and *Holley v. Department of Health and Human Services*. The Army determined that Calton had neither successfully completed treatment nor was abstaining from alcohol. To our knowledge, he has not been reemployed. Holley on the other hand had entered treatment even before his removal became effective, continued treatment, and was not drinking. The agency at first reemployed him without back pay, but when the employee petitioned for back pay, claiming he was entitled to it because he was ready to work at all times, EEOC upheld his claim and ordered back pay in *Holley v. Sullivan, Department of Health and Human Services*, EEOC No. 03910008, February 21, 1991. Its rationale was that its earlier conditional orders applied to cases where the agency was not clearly aware of its obligations at the time disciplinary actions were taken. This type of conditioned remedy also took into account the agency's legitimate concern that the employee was not yet rehabilitated. In Holley's case, the Commission found that he was fit for duty from the time of his removal and was entitled to back pay. However, the Board appears not to be applying the concept of conditional restoration in its most recent decisions (*Harris, Banks,* etc.)

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE

INTRODUCTION

In the previous chapter, there was a detailed discussion about the case law involving employees with substance abuse problems. Based on the case law, Cynthia Field of the Office of Personnel Management has prepared draft guidelines on dealing with these problems. Included are the steps to take first, preparing memoranda offering a "firm choice", using delayed discipline, and suggestions for assisting with an employee's rehabilitation efforts. This draft is presented in its entirety following this page. As case law or changes in OPM policy dictates, this document will be updated.

It is important to emphasize that these cases should be handled in a cooperative manner. It is in the best interest of the employee and the Department for the EAP, employee relations, the union, general counsel, and any others involved to work with the employee in a consistent and firm manner. Keep this in mind when reading the following guidance.

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE

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CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE

UNIT 1: INTRODUCTION

A: FACING THE PROBLEM

When supervisors are faced with performance, conduct, or leave problems, especially chronic and worsening problems, an underlying factor may turn out to be alcohol or drug abuse. Our experience has been that agencies wish to assist employees with substance-related job problems so that they can once again be productive. However, because alcoholism and/or drug addiction are conditions in which individuals typically deny any substance-related problem, employees with these conditions may not admit difficulties with alcohol or drugs, or act to correct their performance or conduct deficiencies until agencies initiate a disciplinary or performance-based action which could result in loss of job, grade, or pay. Even if employees admit their problems and seek treatment, complete rehabilitation is often elusive and when relapses occur, agencies are put in the position of determining whether to afford employees additional opportunities for overcoming addictions.

In many cases, managers tolerate substance-related performance or conduct problems for some time before taking action. It is human nature to find it easier to do nothing when faced with performance or job problems apparently tied to substance use or abuse, nothing or threaten without following through, especially when dealing with employees whom supervisors have liked and respected in the past. But the effect of this is to enable these employees to put off facing their substance abuse problems.

B: CASE LAW REQUIRING "FIRM CHOICE"

OPM's guidance, medical literature, as well as developing case law have recognized the importance of continuing to make substance abusing employees face up to dependency and work to overcome it, or face the consequences of failing to perform or conduct themselves at work. Two court cases which led to holdings by the EEOC that agencies must provide a "firm choice" between treatment and discipline before removing employees who are handicapped by alcoholism--*Whitlock v. Donovan*, 598 F.Supp. 126 (D.D.C. 1984) and *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989)--both involved employees who had been allowed to avoid the consequences of their drinking problems for a very long time. Now, the MSPB, after long holding that a "firm choice" was not required, has concurred with EEOC in *Calton v. Department of the Army*, MSPB Dkt. No. DE07528810362 (EEOC Petition No. 03890037), 44 M.S.P.R. 477 (1990), and held that it will hereafter require

agencies to provide a "firm choice between treatment and termination to employees handicapped by alcoholism." There have been no comparable holdings on employees who are handicapped by drug addiction alone.

C: WHERE DO YOU START?

Typically, the agency must consider two courses of action in dealing with misconduct or unsatisfactory performance which may be alcohol or drug-related:

- The appropriate **personnel action or other administrative action** to take for the specific performance, conduct, or attendance deficiency; and

- The possible offer of **assistance to the employee in overcoming his or her alcohol or drug dependence**.

It is recommended that supervisors contact their Employee Relations Specialists and the Employee Assistance Program (EAP) if these actions are being considered.

By making a referral for assistance concurrently with the clearly stated warning or actual proposal to take disciplinary or other adverse personnel action, managers can often get the employees to face up to their failing performance or conduct by showing that they are serious about having work problems corrected. In some cases, getting employees to realize their problems and the consequences if they fail to overcome them may literally save their lives. This approach, forcing employees to choose between getting assistance in resolving personal and/or medical problems which adversely affect their work while there is still time, or being subjected to disciplinary or other adverse consequences, is known as "**firm choice**." (See Unit 3 for a more complete discussion of "firm choice.")

Supervisors have the opportunity to confront employees' substance-related performance or conduct problems under a wide variety of circumstances:

- Employees may raise alcohol or drug problems on their own before supervisors bring them up;

- Supervisors are discussing misconduct or performance problems with employees;

- Supervisors are referring employees to the employee assistance program;

- Supervisors are documenting their offers of assistance and expectations of future acceptable performance and conduct;

- The agency is issuing warning letters on leave, misconduct, etc., or taking lesser disciplinary actions;

- Employees appear at work apparently under the influence of alcohol or a drug;

- Employees are given the formal opportunity to demonstrate acceptable performance;

- Agencies have issued notices of proposal or decision to take adverse or performance actions;

- Employees are challenging adverse or performance actions before third parties; or

- Employees have admitted or tested positive for illegal drug use.

The following guidance, based on OPM's and agencies' experiences and applicable case law, is meant to help in considering these various situations and arrive at informed determinations. It provides specific suggestions to **agency managers and supervisors, employee and labor relations specialists, and EAP specialists** on how to deal with alcohol or drug-related performance or conduct problems, with step-by-step approaches for particular circumstances. **Unit 3** covers "firm choice." **Unit 4** discusses "last chance agreements" and other forms of holding actions in abeyance. **Unit 5** gives suggested language for offering assistance and setting out a "firm choice." **Unit 6** recommends some methods for accommodating substance dependent employees who are attempting rehabilitation.

This guidance is intended to be used along with companion guidance on applicable appellate decisions--A Discussion of Case Law on Alcohol and Drug Abuse as Handicapping Conditions--which provides an extensive discussion of holdings by the courts, MSPB, EEOC, and FLRA on alcohol and drug issues. It is found in Chapter 3 of this manual.

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE
UNIT 2: DEALING WITH SUBSTANCE ABUSE PROBLEMS

A: EMPLOYEE-INITIATED DISCUSSION WITH SUPERVISOR

Ideally, employees who are substance dependent recognize their problems and seek help before they affect their performance, conduct on the job, or health. They may either discuss their problems with employee assistance counselors, or less often, their supervisors. Unless they are voluntarily raising illegal drug use, the following steps are suggested.

- Assure the employee that you will maintain strict confidence about his or her substance dependence problem.

- Refer the employee to the agency's employee assistance program. Offer your assistance in making an appointment with an EAP counselor if the employee wishes it, but don't force it at this point. See Section C on referrals.

- Discuss possible accommodations with the employee if he or she believes they are necessary. It is suggested that accommodation not be put in place without documentation confirming the employee's needs. Usually, the EAP will suggest accommodations based on treatment needs and severity of the employee's illness. See Unit 6 for various methods of accommodation.

- Encourage the employee to persevere with rehabilitation efforts while continuing to perform successfully, and emphasize your willingness to work with the employee.

- Make an informal memorandum , with a copy to the employee, so as to emphasize the importance of this meeting, and your encouragement of the employee's continued efforts. This memorandum will also document the fact that you made the referral and when you did it. Note that written actions should be kept confidentially by the supervisor unless it becomes necessary to include it in an adverse action file.

B: SUPERVISOR-EMPLOYEE COUNSELING SESSION

Employees most often will not come to grips with substance addiction until their supervisors bring performance, conduct, or leave deficiencies to their attention in job counseling sessions.

In other situations, however, even though supervisors or personnel specialists may strongly suspect that employees' job difficulties are related to substance abuse, employees will not divulge or admit this connection during job counseling sessions. Following are recommended steps to consider in job counseling situations where you suspect or the employee claims that the performance or conduct problems are related to substance abuse.

- In the meeting, set forth the specific performance, conduct, or leave deficiency. (Have the facts written down before the meeting.)

- Explain what needs to be done to correct the problem: for example, bringing performance to an acceptable level; ceasing specific types of misconduct; following agency leave requirements.

- If the employee has previously brought a substance abuse problem to your attention (see Section A, above), discuss his or her earlier efforts to overcome the substance abuse problem, and <u>give the employee a firm choice between acceptable performance and conduct along with successful rehabilitation or else face agency corrective actions, up to and eventually including removal</u>. (See Unit 3 on firm choice.)

- Specify what assistance the agency will provide. This may include developing a performance improvement plan or formally offering counseling through the EAP if the employee believes a personal problem may be affecting performance or conduct. (See the next section on referrals)

- If the employee raises a substance dependence problem during the meeting, give him or her an opportunity to supply more details and medical and/or other specialists' documentation as to his or her addiction. Even if the employee does not supply further documentation of a possible addiction, or if he or she then denies it, denial of addiction itself can be a symptom of alcohol or drug dependency. At this stage, once the employee has raised the issue, you cannot simply ignore the problem. The employee does not have to prove addiction to a certainty before you need to consider accommodation; all that is required is your "reasonable suspicion" of a dependency problem. (*Terry v. Department of the Navy*, MSPB Dkt. No. SF07528710394, 39 M.S.P.R. 565, 1989)

- If the employee supplies more documentation as to his or her substance dependence, you need to work closely with the EAP and other personnel experts to determine whether the information is sufficient to warrant consideration of possible forms of accommodation, including approved leave for treatment, a changed work schedule, or a last chance agreement. Unit 6 provides a detailed list of suggestions for possible types of accommodation when an employee is attempting rehabilitation.

- Write a memorandum for the record documenting what was said at the meeting, again formally referring the employee to the EAP. Give the employee a copy. <u>If the employee has raised a claim of substance dependence, or you have given a firm choice, see the section below regarding the use of a memorandum of understanding.</u>

C: REFERRAL TO EMPLOYEE ASSISTANCE PROGRAM (EAP)

- If you believe that alcohol or drug abuse may be causing the performance or conduct difficulty, consult an EAP counselor and the employee/labor relations specialist on the best course of action (written warning of performance, conduct, or leave deficiencies, formal or informal discipline, etc.) We recommend that you contact the EAP to discuss a possible referral before talking with the employee in this case.

- Make the employee aware in general terms that you believe some personal problem is affecting his or her performance or conduct, and recommend participation in EAP counseling or other rehabilitative effort. Do not attempt to label the problem you suspect, unless the employee identifies it at the time, but instead focus on the performance or conduct.

- When making a referral, advise the employee to contact the EAP to make his or her own arrangements for an appointment. Provide a contact name and phone number whenever possible. Sometimes, supervisors offer to make the appointment or assist the employee to make it at the time of the meeting. Inform the employee also that going to EAP is entirely voluntary, but highly recommended. Preferably, you, the EAP counselor, and the employee/labor relations specialists will work as a team to craft various alternative courses of action, depending on the circumstances.

- Document your meeting and referral for the record, and give the employee a copy.

D: MEMORANDUM OF UNDERSTANDING

To follow up on a supervisory counseling session where the employee raised a claim of substance addiction (either for the first or a subsequent time), one proven method agencies have used to address performance or conduct problems related to substance abuse, while at the same time meeting their legal and regulatory obligations, is to issue a memorandum of understanding. Memoranda of understanding have also been successfully used when an employee comes back on the job after rehabilitative treatment. You can work out the terms of this, preferably with the employee and with help from the personnel office. When possible, give the responsibility for overseeing the employee's progress in any treatment or rehabilitation effort to an EAP specialist, because he or she has the expertise to monitor these efforts and will provide objectivity. Separating the responsibilities for keeping track of performance or conduct improvements from those for monitoring rehabilitation progress makes sense because you only have to watch over what you are familiar with, and lets the EAP do what it is set up for. Ordinarily, a memorandum of understanding contains some or all of the following: (See also Unit 5.)

- The specific performance, conduct, or leave problems you discussed.

- The fact that the employee has raised a claim of substance abuse or dependence as being at least partly responsible for the performance or conduct deficiency.

- A statement of the improvements expected in performance, conduct, or leave. In the case of leave use problems, this may include leave restrictions, or requirements for medical certification for any sick leave requests.

- Referral to the EAP, with the name of a counselor and phone number whenever possible.

- Specifics as to the assistance you are prepared to give the employee. (See Unit 6 for ideas.)

- Requirements for acceptable medical documentation of the substance dependence if the employee wishes to take leave for treatment. Such documentation could include diagnostic information as well as length of treatment,

frequency, or follow-up.

- A clear statement as to what action may follow if the employee is unsuccessful in his or her rehabilitation efforts, or does not carry them through, and poor performance or conduct recurs. Emphasize that the employee is responsible for overcoming his or her substance dependence, and that this condition will not give him or her immunity for future performance or conduct deficiencies.

- A closing statement encouraging the employee to persevere and **emphasizing your willingness to assist.**

E: WRITTEN WARNING

If your agency is at the point of issuing a warning in connection with less than acceptable performance or conduct, language like that used in a memorandum of understanding can be usefully included. Letters of leave requirement and restriction can also serve as vehicles for separate offers of counseling and/or rehabilitative assistance.

F: EMERGENCY SITUATION WHERE AN EMPLOYEE LOOKS INTOXICATED AND UNABLE TO WORK

You may be faced with an employee who is exhibiting symptoms of intoxication: unsteady gait; blurred speech; falling; erratic or threatening behavior; strong odor of alcohol; or reddened eyes; and may conclude that the employee should not continue to perform his or her usual duties. Consider steps such as the following to deal with the immediate emergency.

Immediate Steps

- Determine whether the employee is an immediate danger to himself or herself, or others. If the employee's behavior is threatening or violent, it is prudent to call the building guards and/or the local police force, just as you would in any situation involving violent or threatening behavior. If the employee is falling or comatose, provide a place to rest until the possibility of harming himself or herself has passed. At the same time, you will probably want to call medical personnel or your health unit to see whether the individual needs immediate medical care, as you would any time an employee becomes ill or hurt at work.

- Look into how to get the employee home safely, without letting him or her drive. Try to contact a family member.

- Find out whether you or your agency can or should order a medical examination under 5 CFR 339. Depending on the nature of the employee's position and whether it is covered under a medical standard or a medical evaluation program, you may be able, and believe it appropriate, to order a medical examination.

- If it is appropriate, depending on the circumstances and the nature of the employee's position, determine whether you can or should order a drug test.

- If there is no authority to order an examination or drug test, request the employee to go to the medical unit for examination, observation, or other procedure to determine whether there is a medical problem, particularly when the cause of the employee's symptoms is not readily apparent. You can not force him or her to do so.

- Document what steps you have taken--how and when.

Subsequent Steps

- If there is an absence involved, decide how it should be charged. In some circumstances, you may want to grant the employee excused absence ("administrative leave"). Other times, the employee will be willing to take annual or sick leave, or leave without pay. Some agencies believe it appropriate to charge such periods of absence to AWOL, since the employee can be seen as unable to work because of his or her own behavior, particularly if the employee has been ordered by the security force to leave the premises or has been taken into custody by the police because of violent behavior while intoxicated.

- Determine whether disciplinary action is necessary and appropriate (that is, for on-the-job intoxication or drug use, or disruptive behavior) and, if so, what the proper penalty should be. This could be anything from reprimand through suspension, and occasionally, a removal. In *Hougens v. U.S. Postal Service*, the MSPB held that disciplinary action short of removal may in some cases serve as reasonable accommodation of a handicapping condition of alcoholism. (It allows the

employee to continue working while at the same time making it clear that he or she is not immune from the consequences of misconduct.) Evidence to support a disciplinary action can be obtained from supervisor's and other employees' observations on aspects of the employee's behavior and appearance, through the results of drug or breathalyzer tests (though these are not necessary to support charges of intoxication), or through applicable medical reports.

- If disciplinary action is called for, follow applicable agency and/or OPM procedures. Unless you are proposing removal, use the action to give a "firm choice" that continued infractions will lead to more severe action, and ultimately to removal, unless you determine a firm choice is not appropriate for an employee who is determined to be using illegal drugs. You may effect the disciplinary action immediately after following the applicable procedural requirements. You may also choose to hold it in abeyance (that is, delay but not cancel it) to allow for the employee to attempt rehabilitation. Alternatively, you may set up a "last chance" agreement (see Unit 4 on last chance agreements and Unit 5 for samples) with the employee with appropriate conditions set.

- If you are not taking disciplinary action, give a written warning to the employee that he or she is expected to resolve the substance abuse problem and that future misconduct or performance related to substance abuse may result in serious disciplinary action up to and including removal. Refer the employee in writing for EAP counseling. In doing so, provide the employee specific information on the location of the EAP office and any particular individual whom the employee should contact.

G: EMPLOYEE'S OPPORTUNITY TO DEMONSTRATE ACCEPTABLE PERFORMANCE UNDER PART 432

Often, an employee will raise or admit a problem with substance dependence and undertake rehabilitative efforts during a formal opportunity to demonstrate acceptable performance provided under 5 C.F.R. Part 432, **Reduction in Grade and Removal Based on Unacceptable Performance**. Many agencies include, in any notification of this opportunity, a general statement suggesting counseling if the employee believes a personal problem, including substance dependence, may be affecting performance. Always tell the employee in the notification of unacceptable performance the

consequences of not achieving an acceptable level of performance, including the possibility of reassignment, reduction in grade, or removal.

If you have a reasonable suspicion of a substance-related problem in connection with the unacceptable performance, a more specific statement may be required. In fact, *O'Brien v. Mosbacher (Department of Commerce)*, EEOC Petition No. 03850216, held that an agency was deficient in issuing a memorandum to accompany an unacceptable rating because even though the agency suspected an alcohol problem, the memorandum made no mention of the possibility of removal, in other words, did not provide a "firm choice." Whether or not you have a reasonable suspicion of alcohol or drug abuse, an approach something like the following may be useful:

- Provide the employee with a written notification that you have determined his or her performance to be unacceptable. In the notification, state the acceptable level of performance and specific areas the employee should work on to achieve the expected level. It is a good idea to include specific examples of work you have found to be unacceptable. (See FPM Chapter 432 for more information on this process.)

- If the employee has raised the issue of substance dependency as a handicapping condition, make the employee aware that if he or she wishes you to take the problem into account in connection with unacceptable performance, he or she must supply medical or expert evidence to document the substance addiction (just as you would require from an employee who raised any claim of physical or mental handicap). We recommend that in your requests for medical or expert evidence, you solicit advice as to suggested or recommended actions to ameliorate the employee's dependency. In any case, at this point you have a "reasonable suspicion" of the employee's condition and must consider accommodation. Strongly urge the employee to seek counseling through the EAP.

- If you only suspect a problem with drugs or alcohol, include in the written notice of unacceptable performance a statement that you believe personal problems may be affecting his or her performance, and recommend that if this is the case, he or she seek help through the EAP. (See sample language in Unit 5.) Tell the employee that whether or not he or she seeks counseling, you expect the employee to bring

performance to an acceptable level.

- If the employee has admitted, either earlier or currently, to having an alcohol or drug problem, you can combine the rehabilitative effort with the opportunity to demonstrate acceptable performance. Determine whether you can give a "current" user of illegal drugs such an opportunity.

- Explain in the notice of unacceptable performance the assistance you will provide the employee in his or her performance improvement and/or rehabilitative efforts. For a general discussion of rehabilitative assistance, see Unit 6. With respect to a substance dependent employee, this assistance might include:

  - EAP counseling concurrent with performance counseling;

  - Regular meetings with the supervisor to discuss work objectives and assignments, progress or lack of progress in meeting these objectives, and to offer suggestions on how to improve performance;

  - A more structured work environment (fewer distractions);

  - An extension of the time for demonstrating acceptable performance, perhaps combined with a grant of leave for treatment;

  - A modified tour of duty or other restructured schedule.

- Monitor the employee's performance closely and give him or her regular feedback on whether all assigned duties are being accomplished in an acceptable manner, along with what areas of performance continue to need improvement.

- Consistent with confidentiality requirements (which the employee may or may not have waived to some extent), keep in contact with the EAP to see how the employee is doing in any rehabilitative programs. That office may be responsible for monitoring the employee's participation and progress in rehabilitation. A counselor will discuss with the employee the possibility of signing a release statement so the EAP can keep the supervisor more informed on rehabilitation

efforts. In any event, the supervisor should keep the EAP aware of the employee's on-the-job performance so the counselor can maintain pressure on the employee to continue in rehabilitative efforts.

H: PROPOSED PERFORMANCE-BASED ACTION OR ADVERSE ACTION UNDER PART 432 OR PART 752

The most usual time for employees to claim that substance abuse has played a role in their performance or conduct deficiencies is after the agency has proposed a formal action to remove, reduce in grade, or suspend for performance or conduct reasons. Frequently, employees will have denied any problem to their supervisors or even to themselves until the possibility of monetary or job loss becomes real. To emphasize, **denial is part of the disease of alcoholism and other addictions**.

If, in response to a proposed action, an employee raises a claim of alcohol or drug addiction or, given the nature of the charged misconduct, the agency has a reasonable suspicion of substance abuse, it must decide whether to hold its action in abeyance or go forward as proposed. (For a discussion of "last chance agreements" and other ways of placing actions in abeyance, see Unit 4.) Here are several considerations in making this decision, as well as suggestions for possible actions in response to the employee's delayed claim that substance abuse has adversely affected his or her performance or conduct:

- Make the employee aware that if he or she wishes the agency to take the substance abuse problem into account, he or she must supply medical or other expert documentation on the addiction, and describe how it has contributed to the misconduct or poor performance. But remember that *Terry* says the employee "need not prove addiction to a certainty before the agency's obligation to accommodate arises." One option is for the agency to attempt to verify the employee's condition on its own. If the agency refuses to offer accommodation, it takes the risk that the employee can prove a claim of handicap discrimination in an appeal or grievance. Offers of accommodation should be documented since verbal offers are difficult to prove.

- Consider whether to proceed with the proposed performance or disciplinary action, to cancel the proposed action, or to delay effecting it to allow the employee to seek treatment or rehabilitation for the substance abuse problem. In reaching a choice of action, reassess:

- oo the proof of the charges or reasons for action;
- oo the connection or nexus between the charges and the action;
- oo the appropriateness of the penalty in light of the nature of the charges, any mitigating or aggravating factors, and the employee's response;
- oo the employee's entitlement to consideration of reasonable accommodation in light of his or her reply and any information obtained on the employee's possible handicapping condition, including whether or not he or she is a "qualified" handicapped person or is a current user of illegal drugs and thus not a "handicapped" individual;
- oo the connection or nexus between the drug or alcohol problem and the misconduct, leave or performance problem.

- o If the employee has admitted to alcoholism or substance dependence for the first time and requests accommodation for the condition, the agency may provide a "firm choice" by delaying the effectuation of the action or reducing the proposed penalty to an action less than removal. Again, it may not be necessary to provide a firm choice to an employee who currently uses illegal drugs.
- o If the employee has previously acknowledged a substance abuse problem and has been given a firm choice and allowed an attempt at rehabilitation, decide whether to allow a subsequent rehabilitation effort. Note that relapse is not uncommon in the recovery process.

I: EMPLOYEE CLAIMS SUBSTANCE ABUSE AFTER AGENCY DECISION TO REMOVE BUT BEFORE AGENCY HAS EFFECTED REMOVAL

Although agencies need not consider claims of substance abuse or dependency that were made for the first time after the decision was issued to take action based on the misconduct or unacceptable performance, they may consider using last chance agreements or delayed actions, as discussed in the previous section, when an opportunity for rehabilitation might salvage a troubled employee who had previously proven to be a good performer. In addition, the MSPB's case law concerning its consideration of evidence

brought forth by the employee after the agency has decided or effected its action has increasingly laid the burden on the agency to show why it **could not** make the accommodations suggested by the employee after the agency's decision was made or the action effected. See for example *Street v. Department of the Army*, MSPB Dkt. No. SL07528410093, 23 M.S.P.R. 335 (1984); and *Day v. Department of the Army*, CH07528910118, 47 M.S.P.R. 617 (1991).

J: SUBSTANCE DEPENDENCE RAISED AS AFFIRMATIVE DEFENSE DURING APPEAL OR GRIEVANCE PROCESS

Sometimes employees who appeal or grieve performance-based or adverse actions may claim a handicapping condition of substance abuse as an affirmative defense in their challenges to agency actions. While an agency may believe that it has proven its case and can demonstrate that it has not discriminated against the employee, the agency may think a settlement agreement or last chance agreement is in its best interest when an employee raises this affirmative defense in connection with an appeal or grievance. **But not every case can be or should be settled.**

In addition to conditions for holding actions in abeyance stated in Unit 4, any condition the agency believes useful to require if the employee is brought back on the job can be included **if the employee and/or his or her representative agree**. "Last chance" and settlement agreements must be developed consistent with the legal and regulatory requirements governing personnel actions. Settlement conditions have included:

- Establishment of a period in which the employee is given another chance but with a waiver of the right to appeal or grieve the effecting of the agency's action during that period.
- Alternatively, immediate imposition of a lesser disciplinary action with a removal action held in abeyance.
- Detail, reassignment, or reduction in grade to a nonsensitive position or one without duties the employee might be unsafe performing.
- Provision for medical examinations through the agency health unit or other means, and/or alcohol or drug testing on a random or periodic basis.
- Requirement for successful completion of the agreement to restore or maintain a security clearance.

- Adjustment of performance requirements.

- Provisions for paying or not paying back pay, attorney fees, etc.

Settlement agreements can:

- Give the agency a degree of control over the employee's return to work;

- Clearly warn the employee of the consequences of failing to meet conditions;

- Be enforced by MSPB if entered into the record.

For case law in this area, see Chapter 3.

K: EMPLOYEES HAVE ADMITTED OR TESTED POSITIVE FOR DRUG USE

Because of the special requirements of Executive Order 12564 of September 15, 1986 and FPM Letter 792-19, an agency may not believe that it can or needs to provide an opportunity for rehabilitation once it has determined illegal drug use by an employee. The agency may refer the employee to counseling but continue with removal of the employee, or if the confirmed drug use is the employee's second offense, the agency may proceed at once to the removal process. See the discussion of firm choice in Unit 3. Also, check the accompanying discussion of applicable case law in this area (Chapter 3) and with your legal counsel.

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE
UNIT 3: FIRM CHOICE

A: WHAT IS "FIRM CHOICE?"

Just what is "firm choice" and where does the term come from? OPM's guidance material recommends that supervisors discuss performance and conduct problems with employees and tell them about available health services if the performance or conduct problem is caused by a health or personal problem. If the employees do not accept help and performance or conduct continues to be unacceptable, the guidance calls for supervisors to provide a firm choice between employees' accepting agency assistance through the EAP (including counseling or professional assessment of their problems), and cooperation in treatment, if indicated, or accepting the consequences of continued unsatisfactory performance or conduct, up to and including removal.

B: HOW DO YOU GIVE A FIRM CHOICE?

Rodgers (cited in Unit 1: Introduction) restates OPM's advice as follows: "If the employee's unsatisfactory job performance continues, the agency must provide the employee with a "firm choice" between treatment and discipline. The agency **must clearly and unequivocally warn the employee that unsatisfactory job performance caused by drinking will result in discipline, eventually including the termination of employment."** (emphasis added) This statement is important. "Firm choice" is not a *pro forma* device to be called into use only when the agency has reached the stage of removing an employee. Agencies should start early and get the message through loud and clear, through the consistent and graduated use of **written offers of counseling and warnings, and progressive discipline**. Furthermore, once employees have been warned of the consequences, carry the warnings through. Both in *Whitlock* (cited in Unit 1: Introduction) and *Rodgers* the agencies had repeatedly warned and threatened, but never carried through. In a few cases, the first indication of a substance-related conduct problem is a serious or criminal infraction, and there may not be the opportunity for progressive discipline nor would the current case law require it. (*Hougens v. U.S. Postal Service*, MSPB Docket No. PH07528610373, 38 M.S.P.R. 135 (1988))

C: IS A FIRM CHOICE REQUIRED FOR EMPLOYEES HANDICAPPED BY EITHER ALCOHOLISM OR BY DRUG ADDICTION?

All the case law so far that pertains to "firm choice" has been connected with adverse actions against employees who are

handicapped by alcoholism. It probably is not required for those who are current users of illegal drugs, since the Americans with Disabilities Act amended the Rehabilitation Act to exclude such current users. It makes equally good sense to treat them no differently, if there is a chance to salvage a good employee. In fact, Executive Order 12564, Drug-Free Federal Workplace, seems to envision this when it requires the simultaneous initiation of disciplinary action coupled with referral to the EAP for counseling.

D: WHEN IS A FIRM CHOICE APPROPRIATE?

"Firm choice" in OPM's view is not tied exclusively to removal but can and often should be given much earlier. The earlier part of this guidance discusses various situations where it may be appropriate. Even if a firm choice must be repeated before the point of removal, it should not be necessary to do a last "firm choice" once the point has come when the agency determines that the employee can no longer be kept on the rolls, if the agency has been consistent in warning and following through. However, if there is no indication at all of alcohol or drug addiction problems until removal is proposed, then a firm choice between treatment and removal would be appropriate.

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE

UNIT 4: LAST CHANCE AGREEMENTS AND OTHER DELAYED DISCIPLINARY APPROACHES

A: LAST CHANCE AGREEMENTS

What is a "Last Chance Agreement?

A "last chance agreement" is a bilateral agreement in which the agency agrees to hold an action in abeyance (or in some cases substitutes a lesser penalty) for a specific period of time, in return for the employee's promise to meet the conditions of the agreement for the stated period. If the employee fails to live up to one or more of the conditions set out in the agreement during the time the agreement is in effect, the agency ordinarily effects the original action. If the employee does meet the agreement's conditions, the agency cancels the original action.

Is a Last Chance Agreement or Agency Abeyance Action Applicable for Actions Other Than Removals?

Agencies most often use a last chance agreement or other form of postponed actions in the case of removals. However, agencies are increasingly using these methods of getting the employee to improve conduct, performance, or leave use and to undertake successful rehabilitation efforts in connection with suspensions of various length. It is presumed that they might also be effective in the case of reductions in grade, but OPM is not aware they have been used in this way.

Do Last Chance Agreements Always Provide for No Action to Be Taken During an Agreed-upon Period?

Many last chance agreements do provide that no disciplinary actions will be taken during the period in which the employee is given another chance for rehabilitation and/or demonstrating acceptable performance, conduct, and leave use. Increasingly, however, agencies and employees are arriving at agreements which provide for a lesser disciplinary action to be implemented immediately in any case, and the original action to be canceled or implemented later, depending on whether or not the employee has lived up to the terms of the agreement. See case law discussion (Chapter 3) on this issue, particularly EEOC's affirmation of such provisions.

Can a Last Chance Agreement Constitute a "Firm Choice"?

A last chance agreement may serve as a very effective firm choice, either in the case of an employee who has been given

earlier chances at rehabilitation whom the agency is attempting to salvage for the last time, or for an employee who has failed to acknowledge substance abuse as being a problem. In this use of last chance agreements, a lesser action immediately effected, with the greater action placed in abeyance would inform the employee emphatically of the need for improvement and successful rehabilitation.

What are the Typical Elements of a Last Chance Agreement?

Last chance agreements typically set out conditions the employee must meet and maintain, for example:

- acceptable performance, conduct, and leave use.
- maintenance of a substance-free status while at work.
- participation in a substance-abuse counseling and treatment program as prescribed by an EAP specialist or other similar agency specialist. These specialists are in a position to determine the best program, whether outpatient or inpatient, for a particular individual, any health insurance limitations, the employee's potential for rehabilitation, etc. Supervisors and employee/labor relations professionals can best determine whether the recommended rehabilitation program can be accommodated in the employee's workplace.
- a consent for release of information to the EAP and the supervisor to allow reports of the employee's progress in a program to be monitored. Often, the agency has the EAP counselor monitor this progress, but an outside rehabilitative center may be involved, depending on the type of rehabilitation program the employee has entered.
- possible screens for substance use.

An agreement preferably will set a finite period of time for an action to be held in abeyance. This period must be reasonable, taking into account the nature of the addiction, the period of time necessary for the employee to obtain treatment **and** to demonstrate acceptable job performance, conduct, and leave use. Most commonly, agencies set a time limit of from six months to a year, though OPM is aware of periods anywhere from three months to two years.

Many agreements, but not all, provide for waiver of appeal and grievance rights, both current and future. This provision is not

necessary. If an employee or his or her representative is unwilling to agree to a waiver of rights, the agency usually is able to have its action sustained on review if it has clearly stated what is expected of the employee and given him or her a genuine opportunity to undergo rehabilitation. Sometimes the employee will agree to a waiver of review rights, but his or her representative is unwilling. In this situation, if it wishes to include the waiver in an agreement, the agency must demonstrate that it has made the employee aware of the consequences of both failing to meet the conditions of the last chance agreement and of a waiver of rights.

Are Employees' Waivers of Rights Binding Before Third Parties?

In general, the MSPB, EEOC and the Federal Circuit Court of Appeals have affirmed the waiver of appeal rights, both current and prospective, by employees as part of the terms of a last chance agreement. However, some district and circuit courts have held that it is invalid as against public policy to waive **prospective** EEO rights in an otherwise valid agreement.

B: UNILATERALLY HOLDING AN ACTION IN ABEYANCE

Does the Agency Need the Employee's Participation When Holding an Action in Abeyance?

While it is preferable, when possible, to hold an action in abeyance based on a mutual agreement with the employee concerning the conditions he or she must meet in order not to have the action effected, in some cases an employee refuses to participate in developing the abeyance agreement. In such situations, the agency may decide to place the action in abeyance for a specific period of time, without the employee's participation, in order to provide reasonable accommodation, to be prepared for any possible third party review, or again, to try to salvage a good employee. In this case, the agency ordinarily sets out in a memorandum the conditions it expects the employee to meet in order to have the action canceled at the end of the abeyance period, just as it would in a last chance agreement. While there is no requirement for the agency to develop this type of memorandum when holding an action in abeyance, doing so will serve as a warning to the employee of the consequences of not meeting the agency's conditions.

May the Agency Implement the Delayed Action Without a New Proposal?

Ordinarily, if the agency has given the employee a notice in writing proposing the action, the right to respond to the

proposal, and the other procedural rights of Part 432 or Part 752, a new notice of proposal would not be required. The decision, or preferably the effecting of the agency's action can be held in abeyance pending the employee's successful rehabilitation. If, however, an agency has not yet proposed the action before giving the employee the opportunity for rehabilitation, then it would be good practice to give the employee a memorandum setting forth the agency's reasons for delaying the action, and subsequently giving a notice of proposed disciplinary action if it becomes necessary.

Can the Agency Unilaterally "Waive" the Employee's Review Rights?

Since the employee has various statutory rights of review of disciplinary actions taken against him or her, the employee must be allowed to make a knowing and voluntary decision on whether to waive these statutory rights. When an agency unilaterally holds a disciplinary action in abeyance, there is no opportunity for such an informed decision. Therefore, the agency cannot unilaterally take away the employee's right to appeal or otherwise challenge the action.

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE
UNIT 5: SAMPLE LANGUAGE

Important note: The following samples are intended only to be illustrative and helpful in developing an agency's own documents to cover various sets of circumstances. They are **not** meant to be construed as required language or formulas in any given situation. Your local employee/labor relations office must be consulted before any such letter is issued.

A: REFERRAL WHEN EMPLOYEE HAS NOT CLAIMED SUBSTANCE DEPENDENCE

General Referral Paragraph
(Warning Letter, Memorandum for the Record of Counseling Session, Notice of Proposal, etc.)

If you believe that your [performance, conduct, and/or leave] deficiencies may be caused by a personal, health, or other problem, I encourage you to seek assistance through the Employee Assistance Program office. I will be glad to make an appointment for you, or you may obtain information from Mr/s _____, at [phone extension], in Room _____. Participation in this program is voluntary, and your participation will be kept confidential if you wish. If you want me to consider a medical problem, I will need certain information from you and your physician concerning the medical condition and its effects on you ability to do your job and/or conduct yourself properly.

Sample Paragraph when Supervisor Believes that Substance Dependence May be Causing a Work-Related Problem

I believe that your [performance, conduct, and/or leave] problems may be due at least in part to a personal problem. Therefore, I strongly recommend that you talk with our Employee Assistance Program (EAP) office about possible approaches to overcoming it. I will be glad to make an appointment for you, or you may contact Mr/s _____, a counselor with the EAP, to make your own arrangements. He/she may be reached at [phone extension]. Though keeping this appointment is in your best interest, your participation in this counseling is voluntary and will be kept confidential unless you agree to a release of information about your participation.

B: REFERRAL WHEN EMPLOYEE HAS CLAIMED ALCOHOL OR DRUG PROBLEMS

Memorandum for the Record to Document Performance, Conduct, and/or Leave Problem with Employee

[First list and discuss leave and performance deficiencies.]

You stated that you had overslept on each of the days you were late for work, a result of stress and fatigue you thought, for which you had been taking a combination of aspirin and "a few glasses of wine" to help you relax. Furthermore, stress at work had meant that you couldn't seem to concentrate on your assignments. You said that probably you should see a doctor about your stress problem, and that perhaps your alcohol consumption was "a problem temporarily."

I then pointed out that I have not charged you with unexcused absence for these instances of tardiness, but that I expect you to report for work on time each day in the future, or to submit a statement from your physician each time you are tardy. In addition, I gave you a deadline of one week from the date of our meeting to submit the monthly update. To assure that you stay on top of your deadlines from here on, I am requiring you to inform me two days in advance of the due date for a project of your progress, or any time you are having a problem which may delay submission of the project. I warned you that continued problems with timely submission of your work products may require me to give you a rating of below fully successful with respect to the timeliness standard for your critical element of training and development.

Because of your expressed problems with stress and fatigue, which you seem to believe led to your increased consumption of alcohol recently, I informed you that the services of the Employee Assistance Program (EAP), including short-term counseling and assessment, are available to all employees. Per your request, I have made an appointment for you with Mr/s _____, at _____ am/pm tomorrow, _____, in his/her office, Room ____. I strongly urge you to keep this appointment and take advantages of these services which are available to you. Whether or not you do keep the appointment and accept any counseling or other services recommended to you, I expect you to arrive at work and to submit your assignments in a timely way.

If you do see your physician regarding your problems with stress and fatigue, and wish me to consider a medical problem in connection with your leave and performance problems, I will need to have your doctor supply the following items of medical documentation: _____, _____, and ____, so that we can determine how your medical problems are affecting your work. [See 5 C.F.R. § 339.301, Medical Qualification Determinations, and FPM Chapter 339.]

If you believe that your consumption of alcohol may be affecting your work performance, you may submit a statement concerning this problem, along with a diagnosis of the problem from your own physician, from Mr/s _____ in the EAP office, or from some other

source such as a hospital or clinic.

I emphasize what I said in our meeting: If you are not successful in improving your attendance and any further leave related problems occur, I will initiate formal disciplinary action. If your performance falls below the minimally successful level with respect to timeliness or other aspect, I must initiate a formal opportunity for you to demonstrate acceptable performance. Ultimately, continued unacceptable performance, conduct, or leave use may result in your removal.

I encourage you not to give up your efforts to improve your leave use and the timeliness of your work submissions, and to make full use of our agency counseling and referral services. I am ready to help you in both of these initiatives in any way I can.

Decision Letter when Employee has not Previously Raised Substance Dependence as a Handicapping Condition in Connection with the Agency's Reasons for Action

[First discuss proposal and reasons for action, any mitigating or aggravating factors, unless this is an action taken under Part 432, and of responses by the employee and/or his or her representative.]

I have decided that all the reasons on which the action is based are fully sustained by the requisite evidence and that the proposed penalty is justified by all the appropriate factors set forth in the notice of proposed action.

In your answer to the proposal to take [performance-based action under Part 432 or adverse action under Part 752], you told the official who heard your answer that you were addicted to alcohol, and brought in a statement from Dr. _____, a physician at _____ Hospital, which you had entered for detoxification treatment after receipt of the written proposal to take action. Even though you had previously denied any problem and refused to go to counseling when offered the chance to do so, you asked the official hearing your reply for a last chance to attempt rehabilitation, and said that you would undertake whatever was necessary to overcome your alcohol problem and keep your job. At that time, you and your representative agreed that you would abide by the terms of a last chance agreement to save your job. You, your representative, and the agency official subsequently signed this agreement (attached).

In order to give you an opportunity to demonstrate successful rehabilitation, I have decided to hold this action in abeyance for one year in return for your entering into the attached agreement and compliance with its terms. If you abide by its

terms, no action will be taken based on the reasons I have sustained above. I emphasize that if you fail any time during this next year to achieve and maintain acceptable performance, conduct, and leave use as set out in the agreement, the terms of the agreement are that a date will be set for your immediate [removal, reduction in grade, or suspension]. [Language sometimes included: I note that the attached agreement signed by you, your representative, and the agency official contains a waiver of all appeal and grievance rights arising from this agreement.]

I wish you success in your rehabilitation efforts including the treatment programs you have initiated, and hope that you have resolved your immediate problems with substance abuse and dependency. If you need further reasonable accommodations with regard to your treatment, please feel free to discuss this matter further with the Employee Assistance Program staff and/or with your supervisor. Questions concerning the policies and procedures on which this action is based may be directed to the Employee Relations Branch, Room _____, on extension _____.

Please sign, date, and return the enclosed copy of this letter as acknowledgement of your receipt of the original.

Attachment [Last chance agreement]

Last Chance Agreement (Removal or Lesser Penalty)

Concerning the proposed [removal, reduction in grade, suspension] of _____, dated _____, the parties to this action, the [agency], Mr/s [the employee], and [the representative] agree to the following:

1. The agency will hold the effective date of the employee's [action] in abeyance in return for [his or her] compliance with the terms of the agreement. This agreement will be in effect for a period of 12 months from the date of the signature.

2. The decision to hold the effective date of the employee's removal in abeyance is a "last chance" opportunity for the employee to demonstrate that [he or she] can maintain acceptable performance, conduct, or leave use [specify any special conditions] **[***language used by some agencies*: without alcoholic beverages or any illegal substance in your system.**]**

3. The employee agrees to continue to follow the treatment plan developed by a recognized substance abuse treatment program recommended by the Employee Assistance Program (EAP) staff. The employee will assure that monthly written progress reports will be sent from that program to the EAP office for the period of

rehabilitation in the treatment facility until a recognized medical authority from the treatment facility determines that such treatment is no longer necessary to the employee's freedom from substance dependency. In conjunction with participation in this treatment program and reports to the EAP, the employee agrees freely without reservation to a release to the EAP counselor of information from the treatment facility, and to the supervisor of information pertaining to the employee's continued compliance with the agreed-on treatment plan and the employee's progress during and at the end of treatment.

[4. *Language some agencies have used*: The employee agrees never to report to work, or perform [his or her] duties, with alcoholic beverages and/or illegal substances in [his or her] system which cause an adverse impact on the employee's performance and/or conduct. If the employee's supervisors discern that [he or she] has reported to work after drinking or illegal drug use and that this drinking or illegal drug use is having an adverse impact on performance or conduct, the employee will be immediately required to undergo blood alcohol level and drug screening tests.**]**

5. The employee agrees that, hereafter, an appropriate agency official finds that the employee has failed to abide any of the conditions of this agreement, [his or her] [adverse or performance-based action] would be warranted.

6. The agency agrees that if [the employee] successfully abides by the terms of this agreement for a period of one year, the [action] will be canceled, with a notation in [the employee's] records that it was canceled following successful rehabilitation efforts.

[7. *Optional language*: The employee and [his or her] representative agree to waive all appeal and grievance rights arising from this agreement.**]** Note that *Royal v. Campbell* says the employee may not waive prospective EEO rights.

_____ _____

Employee Appropriate agency official

_____

Employee's representative

_____

Date

CHAPTER 4: SUGGESTIONS FOR HANDLING EMPLOYEES WITH PROBLEMS INVOLVING SUBSTANCE ABUSE
UNIT 6: SUGGESTIONS FOR ASSISTANCE IN REHABILITATIVE EFFORTS

Though supervisors and managers are responsible primarily for monitoring employees' performance and conduct rather than their progress in efforts to overcome their dependence on alcohol or drugs, there are ways that supervisors can assist these employees in rehabilitative efforts. What these mostly involve is giving the employees much less leeway and freedom of action, and applying continued pressure to get them to live up to performance and conduct expectations, while allowing them to attempt rehabilitation through treatment and counseling. Here are some nuts and bolts suggestions for agencies to use in providing reasonable accommodation for employees who are substance-addicted. These will involve some time and work on the supervisors' parts, but can pay off in having more productive employees.

Use of Leave for Treatment or Rehabilitation

With proper medical documentation, it may be appropriate to approve sick leave, annual leave, leave without pay, or advance leave for employees seeking treatment or rehabilitation for substance addiction. (Note that there may be situations when the agency may not require an employee to repay advance sick leave if he or she subsequently retires.) If an employee has accrued sick leave, the agency is required to approve the employee's request for sick leave for treatments other than routine medical checkups if he or she supplies acceptable medical documentation. (See FPM Letter 630-29, October 6, 1983.) Note also that LWOP differs from AWOL in that ordinarily it may not form the basis for a subsequent agency disciplinary action, although action may be based on excessive unscheduled LWOP if certain tests are met. (See FPM Chapter 752.)

Adjustment of Work Schedule or Duty Hours

Often, employees may need some adjustment in their hours of duty or work schedule in order to participate in a treatment or rehabilitation program. Many employees also attend self-help groups such as Alcoholics Anonymous or Narcotics Anonymous during the lunch period. Daily attendance at such meetings is frequently required as part of a treatment program, and employees can be assisted in this requirement by having a work schedule adjustment such as an extended lunch period. Other adjustments could include temporary reassignment to the day shift for the employee who works at night, to allow for closer supervision, making up missed time at either end of the workday, etc.

Shorter-Term Deadlines and Closer Supervision

Substance addictions are progressive diseases which affect all areas of individuals' lives. Since the last area affected is ordinarily the workplace, employees in early recovery usually benefit from having supervisors manage more closely, using short-term deadlines and careful scrutiny, to help the individuals repair some of their lack of control on the job. While consistency, clear expectations and instructions, and more feedback (both positive and negative), help all employees, substance addicts especially need these since they are not always self-motivated. Some addicts can also use retraining in areas in which they may have lost skills while actively engaging in their addiction.

Suspension of Travel Requirements

During the period of rehabilitation, EAP experts have found it important that the employees be able to attend counseling sessions and "twelve-step" meetings on a regular basis. OPM recommends that, where possible, agencies not send such employees on travel assignments until the period of rehabilitation is completed. Substance abusing employees often have problems while on official travel, away from close supervision, which managers and supervisors can attempt to overcome by delaying travel for these individuals.

Reassignment or Detail

Generally, it is not advisable from a treatment perspective to detail or reassign employees who are participating in recovery programs. Part of these employees' denial defenses may be to claim that they don't have problems, but that management or specific supervisors are out to get them or that personality conflicts get in the way of effective communication. These claims may be real, in which case a reassignment or detail can be appropriate. However, taking these employees out of their regular jobs in most cases only serves for the agency to tolerate and ignore the increasing problems without holding the employees accountable for their performance, conduct, and attendance on a consistent basis.

CHAPTER 5: SOME COMMENTS ABOUT REASONABLE ACCOMMODATION AND OTHER MENTAL HEALTH PROBLEMS

INTRODUCTION

The last two chapters have focused on case law and guidance concerning employees with alcohol and substance abuse problems. While many of the same principles will apply when handling employees with other types of mental health problems, there are some other accommodations not related to substance abuse which warrant discussion here.

CHAPTER 5: SOME COMMENTS ABOUT REASONABLE ACCOMMODATION AND OTHER MENTAL HEALTH PROBLEMS

CHAPTER 5: SOME COMMENTS ABOUT REASONABLE ACCOMMODATION AND OTHER MENTAL HEALTH PROBLEMS

UNIT 1: WHAT IS REASONABLE ACCOMMODATION?

The Rehabilitation Act (and the ADA) requires that an employer provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can be shown that the accommodation would impose an undue hardship on the business.

A: DEFINITION OF REASONABLE ACCOMMODATION

EEOC's technical assistance manual defines reasonable accommodation as "any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity."

B: EXAMPLES OF ACCOMMODATIONS FOR PERSONS WITH MENTAL DISABILITIES

Fortunately, accommodations for persons with mental disabilities are some of the easiest to make and at little cost to the agency. Job restructuring is a common method. This is frequently accomplished by exchanging functions with another employee or by changing when and how tasks are done. EEOC provides this example:

> "A person with mental retardation who can perform job tasks but has difficulty remembering the order in which to do the tasks might be provided with a list to check off each task. The checklist could be reviewed by a supervisor at the end of each day."

Modified work schedules are also common for employees with mental health problems. The following example is probably the most frequently used method:

> "An accountant with a mental disability required two hours off, twice weekly, for sessions with a psychiatrist. He was permitted to take longer lunch breaks and to make up the time by working later on those days."

Flexible leave plans and flexible work sites are also possibilities. L.L. Mancuso, in an article entitled "Reasonable Accommodation for Workers with Psychiatric Disabilities", (in Psychosocial Rehabilitation Journal 14(2), 2-9, 1990) discusses the following accommodations that are actually being done for employees with psychiatric disabilities:

Physical Environment:

- o Purchase room dividers for a data entry operator who has difficulty maintaining concentration in an open work area

- o Arrange for an entry-level worker to have an enclosed office to reduce noise and interruptions.

Interpersonal Environment:

- o Arrange for all work requests to be put in writing for a library assistant who becomes anxious and confused when given verbal instructions

- o Train supervisors to provide positive feedback along with criticisms of performance for an employee re-entering the work force after a long psychiatric hospitalization

- o Allow a worker who personalized negative comments to provide a self-appraisal before receiving feedback from a supervisor

- o Schedule daily planning sessions with a co-worker to develop hourly work goals for someone who functions best under structure.

Job Structure:

- o Arrange for work at home for a worker who cannot drive or use public transportation due to mental illness

- o Re-structure a receptionist job to eliminate peripheral duties (e.g. lunchtime switchboard coverage) normally handled by individuals in this position

- o Exchange problematic secondary duties for part of another employee's job description.

Work Schedule:

- o Allow a worker with limited physical stamina to extend his/her hours of work to allow for additional breaks or rest periods during the work day

- o Allow a worker to shift his/her schedule by l.5 hours twice each month to attend psychotherapy appointments.

However, not all mental handicaps can be accommodated. Also, all of the accommodations described above may not be possible in the Federal government. For example, an employee's failure to continue with prescribed medication can lead to violent or erratic behavior at the worksite. Sometimes this will mean that the employee is not a "qualified" handicapped person or that providing accommodation would be an undue hardship for the agency.

CHAPTER 5: SOME COMMENTS ABOUT REASONABLE ACCOMMODATIONS AND OTHER MENTAL HEALTH PROBLEMS

UNIT 2: EAP ROLE

A: EAP AS A REASONABLE ACCOMMODATION
B: OTHER HELP PROVIDED BY THE EAP

The EAP is frequently a vital part of reasonable accommodation. As mentioned in previous places, the program can offer assessment, referral, short-term counseling and follow-up for employees with emotional problems. In addition, the EAP can act as an advocate with management in setting up accommodations for employees with mental disabilities, particularly those returning to work from a hospitalization. The program may, for example, be able to find employees "supported employment" programs. These programs usually provide free job coaches and other assistance to enable certain individuals with disabilities to learn and/or to progress in jobs.

The EAP can also assist managers hiring people with identified mental disabilities to design "reasonable accommodations" before the employees come on board. EAP counselors can also help prepare new employees' co-workers to handle the disabilities.

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION

INTRODUCTION

In this chapter are some additional resources for the specific areas discussed throughout this document. These may be useful to EAP staff or others in assisting clients who may need information about a particular topic, particularly disabilities.

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 1: WHO TO CONTACT FOR MORE INFORMATION ON THE HHS EAP, PERSONNEL INSTRUCTION 792-2, OR THIS DOCUMENT

For all of the issues discussed in this document, contact the EAP Director's office for assistance in contacting the correct individuals or to see how similar situations have been handled in the past. The office can be reached at:

Director, Employee Assistance Program
200 Independence Avenue, S.W.
Room 5-35E
Washington, DC 20201

202-690-7322 (main office number)
202-690-7954 (EAP Director)
202-690-8229 (EAP Specialist)

Also contact this office for further information on HHS Personnel Instruction 792-2, the HHS EAP policy. This policy is written and administered by the EAP Director's office. In addition, HHS has 16 EAP Administrators around the country and at various headquarters locations. A list of their offices is found in Appendix A.

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 2: WHO TO CONTACT FOR MORE INFORMATION ON THE AMERICANS WITH DISABILITIES ACT OR THE REHABILITATION ACT

The EEOC has developed an extensive resource directory for persons concerned with the ADA (and Rehabilitation Act) or other general information regarding disabilities. It can be obtained by contacting:

U.S. Equal Employment Opportunity Commission
1801 L Street, NOW.
Washington, DC 20507

Title: A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act

To order call: 800-669-EEOC

ADA Helpline: 202-663-4900

For specific information regarding HHS policy and case law in this area, contact:

Center for Human Resource Strategic Planning and Policy
Human Resource Disability Issues Manager
200 Independence Avenue, S.W.
Room 50OE
Washington, DC 20201

202-690-6424

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 3: WHO TO CONTACT FOR MORE INFORMATION ON THE DRUG-FREE WORKPLACE

Within HHS, the DFW (including drug testing) is the responsibility of:

Personnel Security and Drug Testing Program
Division
ASPER
200 Independence Avenue, SAW
Room 5-23B
Washington, DC 20201

202-690-5756

The DFW is handled at the national level by:

Office of National Drug Control Policy
Executive Office of the President
Washington, DC 20500

Assistance on Federal issues may also be obtained from:

Employee Health Services Branch
Office of Personnel Management
1900 E Street, N.W.
Room 7412
Washington, D.C.

202-606-1269

The National Institute on Drug Abuse also offers assistance with DFW issues. They have a toll-free number:

800-843-4971

Each state government has an office concerned with the issues of alcohol/drug use and can also provide assistance on DFW issues.

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 4: WHO TO CONTACT FOR MORE INFORMATION ON CONFIDENTIALITY ISSUES

The EAP Director's office is the best place to contact regarding issues related to the Privacy Act and the confidentiality regulations. They have on-going contact with the Office of the General Counsel (OGC) around such issues. Privacy Act issues and confidentiality regulation (42 CFR Part 2) issues are typically handled by different OGC offices. The EAP Director's office can help direct persons to the appropriate office or usually find out the necessary information. The office can be reached at:

Director, Employee Assistance Program
200 Independence Avenue, S.W.
Room 5-35E
Washington, DC 20201

202-690-7322 (main office number)
202-690-7954 (EAP Director)
202-690-8229 (EAP Specialist)

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 5: WHO TO CONTACT FOR MORE INFORMATION ON THE STANDARDS OF ETHICAL CONDUCT

Each Federal agency is required to designate an Agency Ethics Official. In HHS, these matters are the responsibility of:

Office of Special Counsel for Ethics
200 Independence Avenue, S.W.
Room 707E
Washington, DC 20201

202-690-7258

Regulations on conduct and ethical behavior of Federal employees, including Standards of Ethical Conduct, are the responsibility of the Office of Government Ethics. For further information contact:

Office of Government Ethics
Suite 500
1201 New York Avenue, NOW.
Washington, DC 20005-3917

202-523-5757

CHAPTER 6: RESOURCES AND ADDITIONAL INFORMATION
UNIT 6: WHO TO CONTACT FOR OTHER GENERAL (NON-HHS) EAP INFORMATION

Additional information on EAPs in general may be obtained from the Employee Assistance Professional Association (EAPA), the national professional association for EAPs. They can be reached at:

EAPA
4601 N. Fairfax Drive
Suite 1001
Arlington, VA 22203

703-522-6272

EAP AND PERSONNEL GUIDANCE
APPENDIX A
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HHS EAP ADMINISTRATORS

EAP ADMINISTRATORS

REGION I
Nancy Hills
EAP Administrator, DHHS
JFK Federal Building, Room 1503
Boston, Massachusetts 02203
617-565-1391

REGION II
Robert Pollio
EAP Administrator, DHHS
Regional Personnel Office, Room 39-120
26 Federal Plaza
New York, New York 10278
212-264-2586

REGION III
Brenda Wells
EAP Administrator, DHHS
Regional Personnel Office, Room 9400
3535 Market Street
Philadelphia, Pennsylvania 19104
215-596-6428

REGION IV
Mary Plummer
EAP Administrator, DHHS
101 Marietta Tower, Room 1604
Atlanta, Georgia 30323
404-331-2452

REGION V
Kenneth Haycock
EAP Administrator, DHHS
Regional Personnel Office, 22nd Floor
105 West Adams Street
Chicago, Illinois 60603
312-886-5494

REGION VI
B.J. Williams
EAP Administrator, DHHS
Regional Personnel Office, Room 930
1200 Main Tower
Dallas, Texas 75202
214-767-3120

REGION VII
Sharon Murphy
EAP Administrator, DHHS
P.O. Box 15458, 601 East 12th St.
Kansas City, Missouri 64106
816-426-7309

REGION VIII
Donna Keeling
EAP Administrator, DHHS
Regional Personnel Office, Rm 1031
19th and Stout Streets
Denver, Colorado 80294
303-844-6391

REGION IX
Sage Kataoka
EAP Administrator, DHHS
Regional Personnel Office, Rm 118
50 United Nations Plaza
San Francisco, California 94102
415-556-3437

REGION X
John Murphy
EAP Administrator, DHHS
Regional Personnel Office, Mail Stop RX-05
2201 Sixth Avenue
Seattle, Washington 98121
206-553-8033

CENTERS FOR DISEASE CONTROL
Pat Brown
Personnel Management Office
Centers for Disease Control
1600 Clifton Road, N.E.
Mail Stop D01

Atlanta, Georgia 30333
404-639-3608

HEALTH CARE FINANCE ADMINISTRATION
Linda Frederick
EAP Administrator, DHHS HCFA
G-21 East High Rise
6325 Security Boulevard
Baltimore, Maryland 21207
410-966-5523

SOCIAL SECURITY ADMINISTRATION
Patricia Hicks
EAP Administrator, DHHS SSA
3120 Annex
6401 Security Boulevard
Baltimore, Maryland 21235
410-965-1010

SOUTHWEST COMPLEX
Geri Cooperman
EAP Administrator, DHHS
Room 1036, Switzer Building
330 C Street, S.W.
Washington, D.C. 20201
202-205-5790

NATIONAL INSTITUTES OF HEALTH
Robert Ostrowski
EAP Administrator, NIH
Building 31, Room 1C02
9000 Rockville Pike
Bethesda, Maryland 20892
301-496-2801

PUBLIC HEALTH SERVICE
Peter Mazzella
EAP Administrator, DHHS PHS
Rockwall Building #2
5515 Security Lane, Suite 901
Rockville, Maryland 20852
301-443-2257

EAP AND PERSONNEL GUIDANCE
APPENDIX B
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DEFINITIONS OF FREQUENTLY USED TERMS

DEFINITIONS

ADA: Americans with Disabilities Act (Public Law 101-336, 1990); a comprehensive anti-discrimination statute that prohibits discrimination against individuals with disabilities in private and state and local government employment, and in the provision of public accommodations, public transportation, state and local government services, and telecommunications. For using this document, it is also important to know that the ADA amended the Rehabilitation Act, which makes similar anti-discrimination provisions for Federal employees.

FIRM CHOICE: offer to an employee affected by a substance abuse problem of an unequivocal choice between effective treatment of his or her condition or the **initiation** of removal procedures (rather than merely **proposing** a removal). This definition was set forth by MSPB in the Harris v. Army decision (1993).

INDIVIDUAL WITH A DISABILITY: an individual with a disability is one who has: a physical or mental impairment that substantially limits at least one major life activity; a record of such an impairment; or is regarded as having such an impairment. This definition is found in the ADA.

LAST CHANCE AGREEMENT: a bilateral agreement for an agency to hold an action in abeyance (or in some cases substitute a lesser penalty) for a specific period of time in return for an employee's promise to meet the conditions of the agreement for the stated period. A last chance agreement may also serve as a firm choice.

MRO (MEDICAL REVIEW OFFICER): a licensed physician with knowledge of substance abuse; is responsible for receiving and interpreting laboratory results on persons who have been tested for drug use under the Drug-Free Workplace Program.

QUALIFIED HANDICAPPED INDIVIDUAL: same as "individual with a disability"; see definition above.

REASONABLE ACCOMMODATION: any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.

SAFE HARBOR: a provision in the Drug-Free Workplace Program for employees to voluntarily admit to their drug use prior to being identified by the Department. Once employees claim safe harbor they must complete treatment through the EAP and refrain from further drug use. If these conditions are met, the Department

will not initiate disciplinary action related to the drug use.